IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 428 & 429

PENNSYLVANIA WATER & POWER COMPANY AND SUSEQUEHANNA TRANSMISSION COMPANY OF MARYLAND, *Petitioners*,

VS.

FEDERAL POWER COMMISSION, AND CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, INTERVENORS, *Respondents*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Petitioner*,

VS.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERVENOR-RESPONDENT, CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE

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OPINION BELOW AND RELATED CASES

The Opinions and Orders of the Federal Power Commission (FPC) affirmed by the Court of Appeals have not all as yet been published. They are reported and or appear in the Record (R.) as follows:

1. Opinion No. 173 and Order of January 5, 1949 reducing the rates of Pennsylvania Water & Power Company (Penn Water) by $1,954,261, and prescribing Penn Water's tariff. 8 F. P. C. 1-106, R., Vol. 16, pp. 4845-4982, 4983-4997.

2. Opinion No. 173-A and Order of February 28, 1949, denying Petition for Rehearing on Opinion No. 173 and Order of January 5, 1949: 8 F. P. C. 170-81, R., Vol. 16, pp. 5178-5194.

3. Order of March 17, 1949 denying Petition for Rehearing on Opinion No. 173-A and Order of February 28, 1949: R., Vol. 16, pp. 5220-5221.

4. Order of October 27, 1949, prescribing new rate schedules for Penn Water: R., Vol. 17, pp. 5267-5292; and

5. Order of December 15, 1949, denying Petition for Rehearing on Order of October 27, 1949: R., Vol. 17, pp. 5315-5320.

6. **The opinion below:** Opinion of the Court of Appeals for the District of Columbia Circuit, affirming the above FPC orders: (July 3, 1951), 193 F. 2d Adv. Sh. 230, R., Vol. 18, p. 5367 (Dissent, R., Vol. 18, p. 5402).

7. Opinion and order of FPC, which prescribed the tariff of Safe Harbor Water Power Corporation (Safe Harbor) and reduced Safe Harbor's rates approximately $600,000: (Oct. 25, 1946), 5 F. P. C. 221.

8. Opinion of the Court of Appeals for the Third Circuit, affirming the last-named FPC order: (Dec. 30, 1949), 179 F. 2d 179; Cert. den. (May 15, 1950), 339 U. S. 957.

9. Opinion of the Fourth Circuit, in the "Baltimore Contract" case: (Sept. 30, 1950), 184 F. 2d 552, R., Vol. 18, p. 5322; Cert. den. (Dec. 11, 1950), 340 U. S. 906.

10. Opinion of the Fourth Circuit, interpreting its mandate in the last-named decision: (Jan. 10, 1951), 186 F. 2d 934, R., Vol. 18, p. 5356.

11. Opinion of the Fourth Circuit, in the "Safe Harbor Contract" case: (Jan. 3, 1952), ... F. 2d ..... (Pamphlet copy filed with this Court by Petitioners.)

12. Opinion of the three-judge Court Middle District of Pennsylvania, holding that the Pennsylvania Public Utility Commission has no jurisdiction over Safe Harbor's rates, and that the Federal Power Commission's Orders were not affected by the legality of the contracts under the Anti-trust laws and the laws of Pennsylvania: (Aug. 7, 1951), 99 F. Supp. 151,

JURISDICTION

The jurisdiction of this Court was invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U. S. C. §1254) and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. §8251).

QUESTIONS PRESENTED

1. Did the Fourth Circuit have jurisdiction, in a collateral action to which the Federal Power Commission was not a party, to annul, directly or indirectly, orders and tariffs promulgated by FPC? (Argument, Part I)

2. Did the Fourth Circuit have jurisdiction, in a collateral action to which the Federal Power Commission was not a party, and without preliminary referral to FPC, to annul contracts the provisions of which had, either in part or in whole, been prescribed as tariffs by FPC? (Argument, Part I)

3. Did the Federal Power Commission have authority to prescribe the tariff here assailed? (Argument, Part II)

4. Does the Federal Power Commission have primary jurisdiction to determine the facts with respect to the legality of the tariff provisions it has prescribed? (Argument, Part III)

5. Did the Federal Power Commission prescribe a lawful tariff? (Argument, Part IV)

6. Did the Federal Power Commission authorize an unlawful Contract? (Argument, Part V)

7. Does the Federal Power Commission have jurisdiction over sales of electricity in Pennsylvania from a physically integrated interstate electric system when, at times, such service consists in whole or in part of unfirm hydro-electric power generated in Pennsylvania, and at other times, in whole or in part, of firm steam-electric power generated in Maryland? (This brief will not argue this question.)

8. Is a "licensee" under Part I of the Federal Power Act, which is also a "public utility" under Part II of that Act, subject to rate regulation under Part II? (This brief will not argue this question.)

STATEMENT

By this action, Penn Water asks this Court to annul orders[1] of the FPC which prescribed tariffs for Penn Water's services and reduced, effective February 1, 1949, Penn Water's electric rates by $1,954,261 a year. Of this reduction, FPC ascribed $1,733,318 to excessive annual charges made by Penn Water to Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) (R., Vol. 16, p. 4980).

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[1] In the Matter of *Pennsylvania Water & Power Company*, FPC Docket No. IT-5915, Opinion No. 173 (R., Vol. 16, p. 4845) and Order issued Jan. 5, 1949 (R., Vol. 16, p. 4983), 8 F. P. C. 1; same case, Opinion No. 173-A (R., Vol. 16, p. 5178) and Order issued Feb. 28, 1949 (R., Vol. 16, p. 5192), 8 F. P. C. 170; Order of Oct. 27, 1949, prescribing rate schedules (R., Vol. 17, p. 5267); rehearing denied Dec. 15, 1949 (R., Vol. 17, p. 5316).

The interstate electric services to which such rate reduction applies have continued unchanged from the effective date of the FPC order (February 1, 1949), to the present.

1. HISTORY OF THIS CASE

The FPC rate reduction order of January 5, 1949 was the result of a plenary investigation[2] by that Commission of the "rates, charges, or classifications" and of the "rules, regulations, practices, or contracts affecting such rates, charges, or classifications" in connection with Penn Water's sales of electric energy subject to FPC's jurisdiction. This investigation, and a similar plenary investigation of the rates, charges, classifications, rules, regulations, practices, and contracts of Safe Harbor (4 F. P. C. 696), had been requested by the Public Service Commission of Maryland (Maryland Commission), the City of Baltimore, and others, in August, 1944 (R., Vol. 15, pp. 4623, 4731).

The Safe Harbor rate case was tried first, the hearings beginning November 17, 1944, and concluding March 16, 1945. They produced a transcript of 6,136 pages of testimony and 255 exhibits. On November 4, 1946, FPC filed its Opinion No. 143 and Order (5 F. P. C. 221), prescribing (a) in its entirety (except as to rates), as Safe Harbor's tariff, the contract between Safe Harbor, Penn Water, and Consolidated of June 1, 1931 (the Safe Harbor Contract),[3] under which Safe Harbor sold its entire output to its two owners, Penn Water and Consolidated, in proportion to their respective ownership, i.e., 1/3 to Penn Water and 2/3 to Consolidated; and (b) reducing rates by $627,000 annually. This order was affirmed by the Third Circuit on December

[2] Initiated by Order of September 1, 1944, 4 F. P. C. 697 (R., Vol. 16, p. 4837).

[3] R., Vol. 15, p. 4554.

30, 1949.[4] In that opinion, the Court said (179 F. 2d at p. 199):

> "Safe Harbor's contracts for power and its backing by the Pennsylvania [Penn Water] and Maryland [Consolidated] companies are exemplary."

The tariff and rates so prescribed and affirmed and service thereunder have continued in effect until the present.

Hearings in the *Penn Water* rate case began April 15, 1946, and continued intermittently to July 16, 1947. They produced a transcript of 21,260 pages of testimony, some 600 exhibits and the above-mentioned Order reducing rates by approximately $2,000,000.

On January 28, 1949, three weeks after such Order reducing its rates, Penn Water applied to FPC for rehearing, averring, *inter alia,*

> "* * * that *since the record before the Commission was closed* there have been *substantial changes* in the *operations* and *contracts* of Petitioner Penn Water, as hereinafter more fully described, so that the bases for the said Order and for many of the findings, conclusions, and requirements contained in said Opinion and Order are destroyed and such findings, conclusions and requirements are not in accord with the facts and the law * * *." (R., Vol. 16, p. 4999) (Emphasis added.)

The "substantial changes in the operations and contracts" so alleged related to unilateral action which had then just been taken by Penn Water.

Changes in "operations" had been effected by an elaborate Operating Order issued by Penn Water on January 26, 1949, just two days before the application for rehearing, to prevent the backfeed of power from Maryland to the

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[4] *Safe Harbor Water Power Corporation v. Federal Power Commission,* 179 F. 2d 179 (1949), Cert. Den. 339 U. S. 957 (1950).

Pennsylvania companies. It directed the operators of the Penn Water and Safe Harbor electric plants on the Susquehanna River in Pennsylvania to throw certain switches, to "split" busses, to break the connections between the Baltimore system and the systems of the Pennsylvania electric companies, and to follow other novel operating procedures which not only changed the long-established unified operation of the entire interstate electrical system but exposed service to the public in the Baltimore and Washington areas to major breakdowns and interruptions and subjected Consolidated's equipment in Baltimore to the possibility of extensive damage.

This grave threat of serious service disruption and property damage impelled Consolidated and the Maryland Commission to seek the immediate protection of a preliminary restraining order which required the restoration of the "operating procedure" uniformly followed for the previous 17 years. This order was obtained in the action which Penn Water had just filed to annul the Baltimore contract.

In opposing the issuance of this restraining order, Penn Water's counsel told the Court that the purpose of these physical changes was to escape FPC jurisdiction, saying (Tr., Feb. 4, 1949, pp. 69, 110, 111):

> "We have filed an application for a rehearing before the Federal Power Commission in order to raise this point.* * *
>
> "But your Honor, we cannot defend ourselves before the Federal Power Commission unless we continue to do what we have done, that is, prevent the mingling of that power. We would have no defense. * * *
>
> "It is the opinion of the lawyers in the proceeding, I believe, and it is my opinion that we cannot upset the Federal Power Commission order, so far as it relates to jurisdiction over the Pennsylvania business, if we

permit power coming from Maryland to mingle with power delivered to those Pennsylvania customers. * * *

"I believe probably they have jurisdiction over us until the physical fact of non-mingling occurs."

Penn Water's Brief (PW Br.) is here silent as to the real occasion for this preliminary restraining order, but asserts (PW Br., pp. 15, 41) that it was obtained to require "Penn Water to perform the Baltimore and Safe Harbor contracts". Judge Miller's dissent in the Court below accepted this erroneous contention, which was also made in that Court.

The changes in "contracts" referred to in Penn Water's Petition for Rehearing were Penn Water's notices to Consolidated of the termination of its contracts with Consolidated (the Baltimore Contract and the Safe Harbor Contract[5] and the institution of suit by Penn Water in the United States District Court for the District of Maryland to annul the Baltimore Contract.

Penn Water's Petition for Rehearing pointed out "the effect of Articles IV and V" of the Baltimore Contract (R., Vol. 16, pp. 5006, 5012).

The close relationship between Penn Water's assault on the validity of its contracts with Consolidated and its application to FPC for rehearing on the rate reduction order was recognized by the Court below where it said (193 F. 2d Adv. Sh., at pp. 233-34, R., Vol. 18, p. 5370):

"* * * The illegality of these system foundation contracts was first raised by petitioners in their petition for rehearing of the January 1949 order, about nineteen months before the Fourth Circuit decision was handed down."

In its Opinion No. 173-A of February 28, 1949, 8 F. P. C. 170 (R., Vol. 16, p. 5178), on such petition for rehearing,

[5] R., Vol. 15, pp. 4606 and 4554, respectively.

FPC pointed out that any unilateral change by Penn Water in such physical operations would constitute a change in its services and rates to Consolidated which could be accomplished only by compliance with the procedural requirements of the Federal Power Act through the filing by Penn Water of amended tariffs, saying:

> "Now, by the changes referred to in Penn Water's application for rehearing, all of the carefully built-up benefits of pool design, investment, construction, and operation apparently are intended to be sacrificed by Penn Water. * * *" (8 F. P. C. at p. 176, R., Vol. 16, p. 5185).

In denying Penn Water's petition for rehearing and thereby avoiding still further delay in the major rate reduction (which it said was "already long overdue"), the Commission, however, carefully directed Penn Water's attention to the appropriate and necessary administrative procedure under the Federal Power Act whereby any challenge to the tariff could be considered by the Commission.[6]

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[6] On this point, the FPC in the same Opinion said at 8 F. P. C. 176 et seq. (R., Vol. 16, at pp. 5186 et seq.):

"Furthermore, our rules (sec. 35.5) require that when a rate or service which has been filed with the Commission, as these foundation contracts have been, 'is proposed to be cancelled and no new rate schedule is filed in its place * * * each public utility required to file the schedule shall formally notify the Commission of the proposed cancellation' 30 days in advance and shall submit a statement of the reasons therefor and that notice has been served upon the other parties to the schedule or contract.' A copy of such notice to the Commission is required to be duly posted.

"Compliance with filing requirements is particularly important in a case like the present where the filings cover, not a single sale and delivery by one party to the other, but interchange of energy and capacity between and among the parties to the contracts and numerous other obligations and rights which are required to be filed as changes under section 35.3(c).

"* * *

"Insofar as such changes affect service, compliance with the rule referred to would enable the Baltimore Co., the Maryland

Instead of responding to this suggestion (which was approved as the lawful and proper procedure by the Court below), and changing its services and rates by the appropriate administrative procedure, Penn Water, on April 22, 1949, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the rate reduction orders. At the same time, Penn Water prosecuted the collateral action instituted by it against Consolidated in the United States District Court for the District of Maryland to annul the Baltimore Contract. FPC was not a party to the latter suit.

The District Court sustained the validity of the contract[7] and excluded Penn Water's voluminous proffers of evidence.

On appeal, the issue submitted by Penn Water was the "invalidity of the agreement on its face,"[8] and the Fourth Circuit reversed stating:[9]

> "* * * we reach the conclusion that the basic agreement is invalid on its face * * *." (R., Vol. 18, p. 5334).[10]

Public Service Commission, or any other interested electric utility or State commission, before such changes are put into effect to make application under section 202(b) for an order 'to sell energy * * * or exchange energy' from and after the time of the proposed change or termination of service, or a complaint under section 207 as to the adequacy of the service to be rendered.

"None of these alleged changes having been made or proposed in the only way they could lawfully become effective, respondents are in no position in this or any other proceeding to urge any objection or claim in reliance thereon. An unlawful attempt to avoid putting into effect the rate reduction we ordered affords no valid basis for objecting to that order."

[7] *Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company of Baltimore* (Feb. 28, 1950), 89 F. Supp. 452.

[8] Penn Water's Brief in Fourth Circuit, pp. 3, 7.

[9] *Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company of Baltimore* (Nov. 21, 1950), 184 F. 2d 552, 560 f.n. (R., Vol. 18, p. 5334).

[10] To the same effect, see Penn Water's Brief herein, p. 8.

On such a curtailed record,[11] the Fourth Circuit not only purported to find the contract to be invalid on its face because of Articles IV and V thereof, but, without any basis (other than Penn Water's rejected but unconceded and untried proffers), made many assertions regarding factual issues, e. g.: potential competition (completely at variance with the conclusions of FPC);[12] the physical operations of the interstate system; the supposed effect of the contract on such operations; the alleged actual exertion of restraints by Consolidated over Penn Water (especially with respect to an alleged "prohibition" by Consolidated of Penn Water's plant expansion); and the relative "economy" of river coal. None of these findings were based on any trial of the facts in any Court. Consolidated not only denies all of these findings but also the jurisdiction of the Fourth Circuit to make them and to hold the contract invalid without at least preliminary reference to FPC. Some of these assertions by the Fourth Circuit were adopted without question by Judge Miller in his dissent below (R., Vol. 18, p. 5402).

Upon such action by the Fourth Circuit, Penn Water filed in its then-pending FPC rate case appeal in the District of Columbia Circuit its motion to annul the orders of the Commission sought to be reviewed in these proceedings. Denial

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[11] Penn Water submitted to the Fourth Circuit 18 printed pages of testimony and 292 printed pages of untried and excluded proffers. This *summary* action by the Fourth Circuit on such a "truncated record" stands in stark contrast to the exhaustive factual investigation which preceded the FPC rate reduction order. Penn Water even here likewise contends that "All that is needed are the power contracts * * *." (PW Br., p. 3 f.n.).

[12] Thus, for example, at pp. 10-11 of FPC's Memorandum on the petition for certiorari herein, it is said:

"These physical limitations, plus the excessive capital investment required for producing the relatively small dependable output, would preclude Penn Water, if operated independently, from competing successfully with steam plants and substantial water would be wasted over the spillways at times of high flow."

of this motion by the District of Columbia Circuit is the primary issue in this case.[13] (Penn Water Br., p. 3).

Upon like action by the Fourth Circuit with respect to the Safe Harbor Contract, Penn Water submitted that fact to the Court below, as a ground for annulment of the FPC Penn Water rate reduction order. (*Consolidated Gas Elec. Lt. & Pr. Co., et al. v. Pennsylvania Water & Pr. Co., et al.*, Jan. 3, 1952, ... F. 2d ....., application for certiorari now pending, Nos. 611 & 612, this Term.)

2. COUNTER STATEMENT OF FACTS

It is to be regretted that at this stage of the litigation it is necessary to direct the Court's attention to many assertions in Penn Water's brief which have no basis in any testimony in this or in any other case before any court, or commission, or otherwise.

These assertions, iterated and reiterated, seek to portray a "large" and "oppressive" Consolidated which ruthlessly has "stifled" and "crippled" "small" and helpless Penn Water and Safe Harbor; which "has consistently exercised its powers in disregard of both Penn Water and the public" (Penn Water Br., p. 40 f.n.); and which is, even now, before

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[13] Absolute annulment of the FPC orders was the sole issue submitted by Penn Water on such motion in the Court below. No modification of the FPC order was requested, argued, or passed upon by the Court. Penn Water's petition for certiorari in this case, at page 15, asks, as alternative relief, that the case be remanded to FPC with directions retroactively to determine new rates "from and after February 1, 1949 on the usual unit rate basis and on the basis of amount of capacity and energy actually supplied at a rate commensurate with the absence of any 'stabilized income' and with allocations of any reduction in rates based on cost of service actually rendered and not on fictitious 'entitlements.'" This was an entirely new form of relief proposed by Penn Water for the first time in this Court. Such alternative relief is not mentioned in Penn Water's brief here, and is apparently now abandoned by it.

this very Court, seeking to perpetuate this outlawry and assault on the public welfare.

Not only does the brief repeatedly make these unfounded charges against Consolidated, but it actually charges FPC itself with an "inexplicable insistence in this case upon arrogating to itself the power to override the antitrust laws in order to give Consolidated a strangle-hold over potential competitors * * *" (PW Br., p. 33); asserts that FPC here has chosen "which companies shall be given power to suppress competition and which one shall be the victim of that suppression" (PW Br., p. 43); and that FPC is "attempting to authorize violation of the antitrust laws by Consolidated * * * in its own private interest or at its own whim" (PW Br., pp. 39-40).

Consolidated cannot longer remain silent before these unsupported and unsupportable charges. The factual issues they raise have never been tried in any Court. The Record which Penn Water presented to the Fourth Circuit in the Baltimore Contract case contained 18 printed pages of testimony, none of which related to these charges, and 292 printed pages of untried and excluded proffers, devoted entirely to such accusations. The case was argued before the Fourth Circuit on the issues presented "on the face of the contract," but much of the material contained in the excluded proffers was incorporated by that Court in its Opinion in rendering summary judgment, and a lengthy footnote to the Court's decision cites, with obviously full acceptance, the untried accusations made in these very excluded proffers (184 F. 2d at pp. 560-61).

The undoubted influence which these unfounded and unsupported charges had upon the Fourth Circuit, and their repetition before this Court, make their refutation here unavoidable.

A. *The Interstate System*

Penn Water's own description (quoted at R., Vol. 16, p. 5183) sets forth in brief compass the necessity for *its own* creation of the interstate electric system as follows:

> "The System had its origin 32 years ago.
>
> "It arose from the necessity of finding a solution to the problem of providing, without large and expensive reservoirs, a uniform supply of power while utilizing the unharnessed energy of a drainage area subject to severe droughts and floods. The average daily flow at Holtwood has varied from as little as 1700 cubic feet per second up to 756,000 cubic feet per second since the Company began operations. Nevertheless, out of this difficult situation, an important and reliable power pool has been developed.
>
> "The answer to the problem was combined hydro and steam supply; not the substitution of hydro for steam, but from the outset the integration and coordination of hydro and steam in the planning for the capacity needed and in the operation and maintenance of the facilities."

The "difficult situation," above referred to, was Penn Water's, with its "unfirm" and highly fluctuating source of power, not Consolidated's with its "firm," around-the-clock steam generation. It was Penn Water which needed Consolidated.

Moreover, Penn Water has never had a franchise territory and has never served the public, which in that entire portion of the State of Pennsylvania is being adequately served under franchises and certificates of public necessity by Philadelphia Electric, Pennsylvania Power and Light, and Metropolitan Edison. (See map attached to Penn Water's Brief.)

Baltimore, being the nearest large city, became in 1910 Penn Water's first and principal market (R., Vol. 1, pp. 20-21, 25-27).[14]

Over the years, the physical system was planned and constructed in the light of that basic situation.

B. *The Baltimore Contract*

In the mid-1920's, Penn Water's management expressed concern over the possible loss of its control of Consolidated as a result of holding company purchases of Consolidated's stock in the open market (Safe Harbor Contract Case, Nos. 611, 612, Current Term, App. Jt. App., p. 118). As a hedge against such possibility, Penn Water prepared and had executed a long-term contract with Consolidated which (1) immediately increased Penn Water's earnings by 64%; (2) made possible Penn Water's increase of its dividend yield on cash paid in from 12.5% in 1926, to 18.8% in 1930, and 25% or above in all the years between 1936 and 1945, in two of which years it reached a rate of 28.2% (Staff Exh. No. 56, R., Vol. 9, p. 3592), and during which period it was able to transfer $10,000,000 in addition to surplus; (3) by later amendment, transferred to Consolidated the heavy burden of the severe fluctuations of Susquehanna River flow; (4) at the depths of the Great Depression, guaranteed to Penn Water the above return which, as an "operating expense" of Consolidated, actually came before Consolidated's own dividends; and (5) produced a net revenue which FPC, in the orders here assailed by Penn Water, found to be about 2½ times what it should have been.[15]

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[14] It is significant that Consolidated's purchase of power from Penn Water at that time was coincident with the acquisition by Penn Water's management of control over Consolidated (R., Vol. 14, pp. 4497-98).

[15] See also statements of FPC in its Opinion No. 173-A of February 28, 1949, 8 F. P. C. 170, 179, f. n. 3 (R., Vol. 16, at p. 5190).

For 18 years (i.e., until FPC asserted jurisdiction and reduced its rates), Penn Water found no fault with this contract but praised it to regulatory authorities as being in the public interest. Moreover, its own officers, in this very case, testified at length as to its great merit (R., Vol. 1, pp. 25-26, 31-34, 69-77). The Penn Water Contract was filed by Penn Water with the Federal Power Commission January 13, 1936 (pursuant to Sec. 205(c) of the Federal Power Act, U. S. C. Title 16, Sec. 824d(c)), and designated by the Commission as Penn Water's Federal Power Commission Rate Schedule No. 1 (R., Vol. 1, p. 68).

C. The Safe Harbor Contract

Penn Water, having planned in the late 1920's for an additional hydro project at Safe Harbor, Pennsylvania, eight miles upstream from its own plant at Holtwood, found itself unable either to finance the new project or to provide a market for its output. After unsuccessfully negotiating with its Pennsylvania utility company customers to participate and assist in the proposed project, Penn Water turned to Consolidated for help. Consolidated provided over $9,000,000 in working capital on unsecured notes during the construction period, purchased two-thirds of Safe Harbor's equity for $6,000,000, unconditionally guaranteed Safe Harbor's $21,000,000 bond issue, and agreed to purchase two-thirds of the entire output of the present plant.

Construction of the entirely new Safe Harbor project was achieved by the cooperation of Consolidated with Penn Water, and was formalized by the contract of June 1, 1931 between Penn Water, Consolidated, and Safe Harbor (the Safe Harbor Contract), which alone made possible the construction of the Safe Harbor project.

In return for this heavy financial outlay, risk, and obligation to absorb this large block of power at the depths of the Depression, when industry was prostrate, Consolidated received only one-half of the voting stock in Safe Harbor. Penn Water, although contributing only half as much as Consolidated did to the company's equity, received the other half of the voting stock. Consolidated purchased all of the non-voting stock.

The Safe Harbor Contract was likewise filed on January 14, 1936, with the FPC as Safe Harbor's Federal Power Commission Rate Schedule No. 1. As noted above, it was prescribed in its entirety by order of FPC of November 4, 1946, as Safe Harbor's tariff, after amendment by a rate reduction of approximately $600,000 a year. This order was affirmed by the Third Circuit on December 30, 1949, 179 F. 2d 179, and cert. den. 339 U. S. 957 (1950).

The Safe Harbor Agreement provided (1) for the necessary financing of a wholly new project, to be wholly owned jointly by Penn Water and Consolidated in proportions of ⅓ and ⅔, respectively; (2) for the sale until 1980 of the entire output of Safe Harbor's initial plant (except such as might be required for the performance of any duty imposed upon Safe Harbor by its charter or otherwise by law) to its two owners equitably in the ratio of their respective stock ownership; (3) for the construction by Penn Water of transmission lines and for the transmission thereover to Penn Water and Consolidated of such output; (4) for the payment by Penn Water and Consolidated to Safe Harbor of amounts sufficient to yield a net return of 7% on its investment, subject to rate changes by regulatory authorities; (5) for coordination and joint use of facilities; and (6) for arbitration of disputes.

Safe Harbor's charter limits it to hydroelectric operation; it has no franchise territory or transmission lines; and at the time the Safe Harbor Agreement was executed, the Pennsylvania Commission had expressly forbidden Safe Harbor to sell its output to anyone except Penn Water and Consolidated. This was later amended, but the Pennsylvania Commission has never given Safe Harbor authority to sell to the public and has consistently forbidden Penn Water to resell Safe Harbor power to the public.[16]

The Safe Harbor Agreement was filed with the Pennsylvania Commission on September 17, 1933, in compliance with an order of that Commission.[17]

Throughout the years, the Pennsylvania Commission found no fault with either the Safe Harbor or Baltimore Contracts. In 1946 and 1947 it conducted rate proceedings jointly against these companies and ordered substantial rate reductions to Penn Water's Pennsylvania customers. Because, under the Safe Harbor and Penn Water FPC filed tariffs, Consolidated would have been required to increase its payments to those companies by the exact amount of such rate reduction, it became necessary for it to seek protection. A special three-judge United States District Court for the Middle District of Pennsylvania enjoined the Pennsylvania Commission from enforcing this order because of the supremacy of Federal jurisdiction. The Court also decided that the rate orders of the FPC had not been annulled by the asserted invalidation of the Baltimore and Safe

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[16] *Pennsylvania Power & Light Co. v. P. S. C. of Penna.*, 112 Pa. Super. 500, 171 Atl. 412, 3 PUR (NS) 152 (1934).

[17] The Pennsylvania Commission's contention that it had not given its approval to the Safe Harbor Contract is disposed of by the Fourth Circuit's statement in the Safe Harbor Contract Opinion (pamphlet copy filed by Petitioners, pp. 4-5): "These two utilities [i.e., Consolidated and Penn Water] are its only customers under an arrangement approved by the Pennsylvania Commission."

Harbor Contracts (*Consolidated Gas Electric Light and Power Company of Baltimore v. John Siggins, et al., Constituting the Pennsylvania Public Utility Commission, Safe Harbor Water Power Corporation and Pennsylvania Water & Power Company* (July 31, 1951), 99 F. Supp. 151). No appeal was taken from this judgment.

Penn Water's and Consolidated's status and rights with respect to Safe Harbor in the Safe Harbor Contract are identical with the sole exception of the ⅓-⅔ entitlement to output and correlative obligation to pay Safe Harbor's expenses and return in the same proportion. This important fact is not apparent from Penn Water's brief, which consistently seeks to convey the erroneous impression that the Safe Harbor Contract is an enslavement of Safe Harbor by Consolidated.

In affirming FPC's order prescribing the Safe Harbor Contract as FPC's tariff, the Third Circuit found the contract to be "exemplary."[18]

Penn Water asserts (Penn Water Br., p. 8 f.n.) that the Safe Harbor Contract is "substantially similar to the Baltimore Contract." It is, in fact, completely different in the following fundamental (as well as other) respects:

1. The Safe Harbor project would not have come into being without the Safe Harbor Contract.
2. It provides for the financing of that project.
3. It sells the entire output of a designated plant.
4. It sells that output to its two owners.
5. Articles IV and V of the Baltimore Contract do not appear in the Safe Harbor Contract.

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[18] *Safe Harbor Water Power Corp. v. Federal Power Commission* (1949), 179 F. 2d 179, 199.

6. The Safe Harbor Contract is limited to the output of a designated plant; the Baltimore Contract was not.

7. The Safe Harbor Contract was not a "residual type" contract as was the Baltimore Contract.

8. Because of these differences, the alleged "restrictions" in the Safe Harbor Contract are clearly severable while those in the Baltimore Contract, *qua contract*, were held not to be.

D. *Consolidated's Alleged Use of "Oppressive Powers"*

At page 14 (and rephrased elsewhere throughout its brief), Penn Water says, "The oppressive contract powers had actually been used by Consolidated (R., Vol. 18, pp. 5330, 5334-5)." This Record reference is to the opinion of the Fourth Circuit in the Baltimore Contract case. But the Fourth Circuit had absolutely no evidence before it on this accusation — and this charge was not tried before it or elsewhere.[19] Yet that Court's acceptance of these unsupported charges on the basis of Penn Water's untried and excluded proffers is now cited as authority for them!

No testimony on any of the following factual issues was before the Fourth Circuit.

Penn Water contends (P. W. Br., p. 14) that Consolidated has actually exercised its "oppressive contract powers" as follows:

(1) By requiring Penn Water to purchase power from Consolidated.

[19] Consolidated had sought arbitration, to secure the impartial determination of disputes, as provided for by the contract. The District Court's exclusion of Penn Water's proffers in the main resulted from its proper conclusion that Penn Water was attempting to submit to the Court matters which it had contracted to arbitrate.

The system operation *set up by Penn Water*, whereby Consolidated was required to provide firm steam "back up" power to Penn Water to permit the latter to convert its interruptible run-of-river hydro into firm power for sale in Pennsylvania is one of the basic facts in this record, supported by Penn Water's as well as FPC's testimony. This means that firm power from Maryland must be available at all times to Pennsylvania when the hydro plant is completely shut down during large parts of each day in periods of low flow, so that Penn Water may discharge its contract obligation to supply firm power to its other customers (R., Vol. 16, pp. 4857 et seq.).

Consolidated, while it has fulfilled its obligation to be ready to supply such "back-up" energy, has never required Penn Water to receive energy from Maryland if at any particular time so-called interchange or unfirm economy energy could be purchased in Pennsylvania at a lower cost than Consolidated's incremental generating cost. In other words, Consolidated has collaborated with Penn Water in obtaining the required energy from the cheapest source. Penn Water's real complaint here is that this often requires obtaining energy from across the Maryland State Line.

Penn Water now calls this "oppression."

(2) By interfering with Penn Water's contracts with its Pennsylvania customers.

These contracts have never been changed from those prepared many years ago by Penn Water. Consolidated has, unsuccessfully, protested to Penn Water that its Pennsylvania customers should not be supplied, as they are, with large quantities of steam-generated power from Baltimore without an adjustment for huge increases in the cost of coal since the contracts were made in the 1930's. Penn Water refused. But FPC agreed with Consolidated as to

the reasonableness of such a change, and prescribed it (R., Vol. 17, p. 5273).

Consolidated also objected, unsuccessfully, to Penn Water's increasing and continued physical diversion of Consolidated's share of cheap Safe Harbor power to Penn Water's Pennsylvania customers. (*Safe Harbor Contract cases*, Nos. 611 & 612 Current Term, App. Jt. App., p. 147).

Penn Water now calls this "oppression."

(3) By "forbidding" Penn Water in 1947 "to expand its transmission system in Pennsylvania to meet the needs of the Pennsylvania customers".

There is likewise no testimony in any case relating to this charge. It refers to a suggestion made by Consolidated in 1947 which, after a study by Penn Water's and Safe Harbor's engineers and approval by their respective Presidents, made possible the provision of spare transformer capacity at Safe Harbor at an expense of only $30,000 instead of $300,000 as originally proposed by Penn Water. The facilities installed under this more economical plan have supplied power without curtailment or interruption during the five years since that time at a substantial saving to the public.

(4) By withholding "over $900,000 of payments due to Penn Water."

There is no testimony in any case relating to this contention.

As stated in Consolidated's brief below, Consolidated intervened in the FPC rate case (1) to protect its share of cheap Safe Harbor power; (2) to obtain whatever rate reduction might be ordered by FPC; and (3) to have FPC determine the reasonableness of Penn Water's mounting

rate case expenses which then and now are billed to Consolidated as an operating expense. Consolidated had reimbursed Penn Water to the extent of $194,000 of these expenses when, becoming alarmed at the profligacy of Penn Water's rate case outlays, it sought the protection of an authoritative determination by FPC as to their reasonableness, *vel non*. In its order of January 5, 1949, FPC declined to determine this issue, saying:

> "The Intervener, Baltimore Company, has petitioned the Commission to determine an allowable amount of rate case expense (with respect to these proceedings) that Respondent, Penn Water, may charge Baltimore Company under contract between them. * * * Intervener's liability, if any, for such an item relating to past transactions, is a contractual one, which is determinable either under the arbitration procedure provided by the contract, or by proceeding in the courts." (8 F. P. C. at pp. 81-2, R., Vol. 16, p. 4960).

On June 30, 1949, Penn Water sued Consolidated in the United States District Court for the District of Maryland (Civil No. 4610) for $1,204,300.41, which was the amount Consolidated up to that time had withheld for this reason from Penn Water's billings, representing Penn Water's rate case expenses up to that time in excess of the above-mentioned $194,000 which Consolidated had paid. Since that date, Penn Water has billed Consolidated well in excess of one million dollars for additional legal expenses, not only in its rate case proceedings, but in its several suits for the invalidation of the Penn Water and Safe Harbor Contracts. Consolidated has established contingent reserves for payment of such rate case expenses pending the ultimate authoritative determination of their reasonableness. It does not believe, as Penn Water contends, that Penn Water's expenses in breaking the Baltimore and Safe

Harbor Contracts are collectible by Penn Water as an "operating expense."

This bona fide effort by Consolidated to protect its customers against the imposition of extravagant charges by Penn Water is cited by Penn Water as an example of Consolidated's "oppressive powers."

Civil No. 4610 has never been tried.

(5) By "prohibiting" in 1948 its construction of a steam plant which could have used "free" river coal, and by insisting, instead, "not only on preventing this source of competition from Penn Water but also on building a new steam plant of its own in Baltimore, to be fueled with the more expensive bituminous coal bought in the market" (Penn Water Brief (P. W. Br.) pp. 14-15).

There is likewise no testimony in any record in any case regarding this contention, yet the Fourth Circuit completely accepted Penn Water's untried proffers in the Baltimore Contract case, and makes this entirely unfounded assertion in its opinion, which is cited by Penn Water as authority for its accusation and which was adopted by Judge Miller in his dissent below!

What are the facts?

In 1948, Penn Water proposed a $17,000,000 capital expenditure at Holtwood for the installation of 66,000 kw additional steam-electric capacity, including coal recovery and processing facilities. Based on the actual cost of a unit which it had just completed, Consolidated estimated that it could install a more efficient 75,000-kw unit at a cost of less than $11,000,000. Penn Water urged that the $6,000,000 *additional cost* for the 9,000 kw *less capacity* would be justified in savings in operating costs through the use of "river coal," i.e., fine particles of anthracite coal which accumu-

late with other sediment in the pools above the dams. Penn Water's proposal included the construction of a $6,000,000 plant for the cleaning and separation of this river coal. Consolidated accepted Penn Water's estimates for its proposed boilers and generators, but such a coal-treating plant has never been built and had not even been engineered when Penn Water asked Consolidated to underwrite the project and, by approving it, to assume the obligation until 1980 to pay all of its expenses and depreciation, and a return on the plant.

Penn Water's proffers regarding the economies of "free" river coal, which the Fourth Circuit accepted in full, without so much as a word of testimony or argument thereon, and which Judge Miller likewise adopts in the dissent below, completely ignores the very heavy costs of dredging, transporting, processing and, in general, making such river coal usable. This includes the cost of providing special river-dredging equipment, barges, provision for their winter storage and protection against ice, unloading piers and handling equipment, equipment for transporting coal-bearing silt to the separating and cleaning plant, the facilities in such plant for desliming classifiers, thickeners, clarifiers, silt-refuse and water pumps, vibrating screens, washing tables, flotation cells, dewatering screens and centrifuges, the provision for large storage areas for disposal of the separated silt and dikes to prevent its re-entry into the river, the transportation of the silt by pipe line to such area and transportation of the separated coal to a dewatering plant, loading equipment at the latter point, and the provision of extensive railroad coal-car storage and loading-yard siding facilities, the cost of railroad transportation from such point 8 miles to the Holtwood steam plant, its unloading and storage at that point, and its subsequent treatment and drying before actual consumption in the

boilers, together with the costs of operating and maintaining this extensive equipment.

River coal is anything but "free"!

For some years Consolidated has been required to add about one steam-electric generating unit a year to provide for its increasing load. When Penn Water made this proposal, Consolidated asked Penn Water for additional engineering data on the coal-treating plant, estimated coal accumulations in the river, railroad transportation costs, etc. This information was not forthcoming in such form as to provide a basis for any engineering recommendation or sound cost estimate. Penn Water has no obligation to provide any additional plant for the public service — Consolidated has. In response to that obligation, and in the absence of essential engineering data on such a huge pioneering venture, as well as in the absence of any commitment from Penn Water that it could have its plant installed in time for, or that its output would be available for, Consolidated's increased system load, Consolidated was forced to proceed with the ordering of its next unit and informed Penn Water that it could not approve and thereby underwrite to 1980 the $17,000,000 expenditure without more adequate engineering data. It again requested such data so that the studies could proceed in connection with the unit to be ordered the following year. Penn Water refused to discuss the project further.

None of this information was before the Fourth Circuit or before the Court below. Penn Water's unfounded charge colored the Fourth Circuit's opinion and the dissent below, and the effort is here made to have this accusation affect the conclusions of this Court. The only record reference which Penn Water makes in support of these accusations is to the opinion of the Fourth Circuit.

3. THE PENN WATER RATE ORDER OF FPC

Penn Water contends that by the Orders here assailed, FPC (a) compelled Penn Water to perform an illegal contract, and (b) based its rate order on Penn Water's continued performance of such contract.

The record does not support this contention. FPC avers that its Orders had no such purpose or effect, and in its Safe Harbor Contract opinion the Fourth Circuit fully concurs, saying, "It is obvious that the Commission did not prescribe the restrictive conditions of the contract as part of the rate order * * *."

When Penn Water in its petition for rehearing of the FPC rate reduction order for the first time raised the issue with that Commission of the invalidity of the Baltimore and Safe Harbor Contracts, FPC, in its Order denying rehearing (1) pointed out the great public benefits produced by the physical, integrated, and coordinated operations of hydro and steam, quoting Penn Water's own assertions to that effect,[20] (2) stated that such physical regional integra-

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[20] FPC there states:

"Penn Water has consistently in its representations to its stockholders and to regulatory authorities explained and emphasized the results and importance of the pooling arrangements. Thus in its 1941 Report to Stockholders it said:

" 'Coordinated operation of this pool of power means that each member not only has available in emergency the combined resources of the interconnected systems, but also derives through daily and seasonal interchange arrangements the benefit which arises from the use of the most economic sources of generation for supplying the power requirements of the pool. A further benefit flows from the possibility of planning generating-capacity additions of the most economic type and size with consequent reduction in the amount of unused reserve capacity that would occur were the systems uncoordinated. Thus the regional transmission network of the Pennsylvania Water & Power Company has multiple purposes, and energy continually flows in, across, and out of it as the needs of the interconnected members develop from minute to minute and day to day.' "
(8 F. P. C. at p. 174, R., Vol. 16, p. 5182.)

tions of facilities is precisely what is sought to be fostered by the Federal Power Act;[21] (3) stated that the validity of its Order is not dependent on questions as to the validity of the contracts,[22] *because* (4) its orders related to rates and services applicable to the continuing *physical operation* of the interconnected physical *system*.[23]

When this issue was again presented to the Commission by Penn Water's Preliminary Statement to its filing of new rate schedules (R., Vol. 17, p. 5253), the Commission yet again emphasized the fact that (1) it was not ordering Penn Water to perform any unlawful provision, and (2) that its orders were limited to prescribing only those tariff provisions defining the physical services to be furnished. The Commission there said (R., Vol. 17, p. 5283):

> "The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by Penn Water and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classifica-

[21] "The regional integration and coordination of facilities, the resulting economies, and the utilization and conservation of natural resources thus achieved are precisely what was sought to be encouraged and fostered by the Federal Power Act and established as a part of the criterion of the public interest to be served by regulation thereunder (Cf. Section 202(a))." (8 F. P. C. at p. 175, R., Vol. 16, p. 5184).

[22] "If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions." (8 F. P. C. at p. 175, R., Vol. 16, p. 5184). This conclusion was accepted by the Court below, and by the three-judge District Court for the Middle District of Pennsylvania (99 F. Supp. 151).

[23] "In our opinion and order we took care to leave the continuation of the operation of the integrated and interconnected system in full effect, merely changing the rates. * * *." (8 F. P. C. at p. 175, R., Vol. 16, pp. 5184-5185).

tion, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force."

As will be seen, *infra*, pp. 31 *et seq.*, the Fourth Circuit (assuming its jurisdiction to do so) invalidated the Baltimore Contract solely because it contained Articles IV and V. Article IV placed restrictions on Penn Water's making new contracts which would commit Consolidated to "firming up" or other obligations. Article V placed restrictions on Penn Water's plant expansions on which Consolidated would have to make payments to Penn Water. Neither of these provisions define the "services to be furnished" by Penn Water under the tariff prescribed by FPC. Moreover, if these two provisions are illegal (which Consolidated submits they are not), they were specifically excluded from FPC's order, which prescribed only those service provisions "in and of themselves lawful."

The Court below fully appreciated that the order of FPC related to the physical operations of the system (which have continued to date without the slightest change, notwithstanding the Fourth Circuit's decisions). As to this, the Court below said:

> "In our view, the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligations under the Federal Power Act to continue the then-existing services and rates. It is those services and rates, reflecting underlying operations, which were the subject of the Commission's order" (R., Vol. 18, p. 5375).

Penn Water insists, however, that FPC may not regulate even the continuing physical operations of the system because the "alleged single interstate system (the facilities of Consolidated, Penn Water and Safe Harbor) [was] cre-

ated by the two illegal contracts * * *" (PW Br., p. 16; see also p. 54). It is true that the physical system *resulted* from these contracts, but the physical system is still there, even though the Fourth Circuit has held (we submit, improperly) the contracts to be invalid. And, of sheer physical necessity, this vast system still continues to function and the loads it serves still exist and must be supplied. The river flow still varies widely and unpredictably, lights and motors go on and off, peak and off-peak loads are dispatched for over-all economy, and power flows back and forth in the system just as it always has. It is to this physical operation that the FPC order is directed. And until the physical operations of that system and the tariffs relating thereto are changed in accordance with the requirements of the Federal Power Act, such physical operations must and will continue. Articles IV and V of the Baltimore Contract have nothing to do with it.

In addition, Penn Water contends that the payment provisions prescribed by FPC constitute illegal "revenue pooling." Consolidated favors no special type of payment provision, but the one ordered by FPC is the one which was devised and promoted by Penn Water and which, in this very case — contrary to Penn Water's present contention — was described in the testimony by Penn Water's own officers as being the only method whereby the greatest benefit from the hydro operations could be achieved (R., Vol. 1, pp. 25-26, 69-78).

It is significant that, although Penn Water made this same contention as to "illegal revenue pooling" in both the Baltimore Contract case and the Safe Harbor case, the Fourth Circuit, in neither case, found such payment method to be either pooling or illegal. A guaranteed return for the entire output of a plant is not "revenue pooling."

4. THE BALTIMORE CONTRACT OPINION OF THE FOURTH CIRCUIT.

As noted above, page 10, the Fourth Circuit determined the case on the narrow issue of "validity of the contract on its face." It had substantially no factual record before it, but borrowed heavily from Penn Water's untried proffers. It made no effort to obtain any factual information or advice from FPC. Assuming its jurisdiction to do so, it made the following determinations:

a. The Fourth Circuit found that the Baltimore Contract was invalid solely by reason of Articles IV and V thereof. The District of Columbia Circuit points out this fact in its opinion. Penn Water takes strenuous exception to this statement of the D. C. Circuit (PW Br., pp. 24-5, f.n.), but the Fourth Circuit's own language is conclusive. In its decision of September 30, 1950, in the Baltimore Contract case, the Fourth Circuit said 184 F. 2d 552, 557, 566):

> "The restrictions which are imposed upon the activity of Penn Water by the agreement and give rise to the contention of invalidity are contained in Articles IV and V as follows:
>
> " 'Article IV. So far as possible consistently with the performance of any duty or obligation to serve imposed on Power by its charter or otherwise by law, Power shall obtain the approval of Electric before entering into any agreement or agreements with any other person or corporation for the sale and/or purchase and/or interchange of electrical and hydraulic power and energy, or before making any substantial modifications in the existing contracts now in force between Power and its customers other than Electric.
>
> " 'Article V. So far as possible consistently with the performance of any duty or obligation aforesaid, Power shall obtain the approval of Electric (1) before incurring any single commitment for investment (except for renewals or replacements) in excess of $50,000.00

on the basis of which Electric shall make payment under Article III(b) hereof, and (2) before alienating or disposing of in any one year any property, plant, or equipment, other than stores and construction equipment, having a total value in excess of $50,000.00 and included in the investments of Power and/or subsidiaries of Power in plant, property or power development devoted to the generation, transmission, or distribution of electrical power and energy.'

"* * *

"The District Judge found and it is not disputed that the effect of the quoted provisions of Articles IV and V of the contract is to confer upon Consolidated the power to control * * * [prices, plant extension, territory, and backfeed purchases]."

"* * *

"There can be no doubt that the freedom of action of Penn Water as a public utility of the state has been and is restricted by the provisions of Articles IV and V of the basic agreement * * *."

In its opinion of January 3, 1952, in the Safe Harbor case, the Court said of its above opinion:

"We there held that the contract between Consolidated and Penn Water then in suit, which for convenience may be called the Penn Water contract, was invalid, because Articles IV and V of the basic agreement of June 1, 1931 conferred upon Consolidated the power to control * * * [the abovementioned activities]."[24]

b. The Court then held the entire contract invalid because, *qua* contract, Articles IV and V were inseparable from the rest of the agreement. In its opinion of January

[24] It is of interest to note that "the effect of Articles IV and V" was the specific "illegality" mentioned in Penn Water's Petition to FPC for Rehearing (R., Vol. 16, p. 5012).

10, 1951, in the Baltimore Contract case, the Court said (186 F. 2d at p. 936):

> "* * * These restrictive conditions were included in order to safeguard Consolidated in the performance of its promises and it is conceded that without them the contract would have been impracticable and would not have been made. * * *"

In this regard it should be noted that the Baltimore contract was executed in 1931 before enactment of the Federal Power Act in 1935. Consolidated's protection against its heavy "open end" obligations to Penn Water was at that time solely a *contractual* protection. Such protection was therefore inseparable from the balance of the contract, *qua contract*. Since the enactment of the Federal Power Act, Consolidated has the protection of the broad regulatory power of FPC and consequently, *qua tariff*, Articles IV and V are not necessary.

c. The Court held that FPC had not prescribed the restrictive provisions of the Baltimore Contract.

In its Baltimore Contract opinion, the Court said (184 F. 2d 552, 565, 566):

> "* * * The restrictive provisions of the agreement were not mentioned and their legal validity was not discussed [i.e., by FPC].
>
> "* * *
>
> "* * * Nor do we undertake to gainsay the view of the Commission that even if the restrictive conditions of the basic contract are invalid, as to which the Commission expressed no opinion, it still has the duty and authority under the Federal Power Act to encourage and establish the interconnection of electrical facilities * * *"

In its opinion in the Safe Harbor Contract case, the Court said:

> "It is obvious that the Commission did not prescribe the restrictive conditions of the contract as part of the rate order in either [the Baltimore Rate Order case or the Safe Harbor Rate Order] case."

d. The Court summarily invalidated the contract despite numerous, genuine issues as to material facts.

The Court based its summary judgment primarily on its factual finding of potential competition. In doing so (there being no testimony in the Record), it accepted Penn Water's untried proffers, and the map which is attached to Penn Water's brief herein. This finding is opposed to FPC's position (based upon exhaustive testimony from all parties) on the same factual issue. The Court was oblivious as well to the fact that Consolidated has no charter, franchise, or certificate rights in Pennsylvania, as to the interruptible character of Penn Water's power. In fact, the Court went so far as to point out (R., Vol. 18, p. 5326) that "Penn Water and Consolidated would be potential competitors for the sale of power to Potomac Edison at Frederick, Maryland, whose lines at that point are only a short distance from the lines of Penn Water so that they could easily be connected." This is another instance of a statement made by the Court on the basis of Penn Water's untried proffer. The Court was entirely unaware of the fact that this possibility had been discussed by Penn Water's and Consolidated's engineers and abandoned as impracticable because the existing power resources of Potomac Edison to the west made it economically unfeasible to provide at heavy expense the interconnection facilities. No testimony on this point has been given in any case.

The Fourth Circuit overlooks entirely the non-competitive character of the field, and that for many years Potomac Edison, Potomac Electric Power Co., Metropolitan Edison, Philadelphia Electric, Pennsylvania Power & Light, and Consolidated have operated as State-regulated monopolies. There is no practical probability that Penn Water would be authorized by the Pennsylvania Commission, or by the Maryland Commission to enter any of the territories now adequately served by those companies. (Cf. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n.*, 341 U. S. 329 (1951).

e. The Court stated that its judgment directly affected the FPC rate-reduction Order.

In the Baltimore Contract case, the Court said (184 F. 2d 552, 568):

> "* * * It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electric energy between them may be continued by some method that would meet the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania. That question is not before us. * * *"

In the Safe Harbor Contract case, the Court said:

> "Further proceedings before the Federal Power Commission will doubtless be necessary if it is ultimately decided that the three party basic contract, as well as the two party basic contract, is invalid; but that course need not involve embarrassment. The problem of the Commission would then be to devise a plan which will effectuate the purposes of the Federal Power Act and at the same time conform to the anti-trust statutes."

The Court erred in summarily striking down the contract, in view of the exclusive primary jurisdiction of the Federal Power Commission to determine the disputed factual issues of potential competition, price fixing, devision of territories, actual approval by the Pennsylvania Commission, and other issues relevant to the validity of the contract, which were alleged by Penn Water and summarily determined by the Court without testimony thereon. The Court erred because of conflict between the Court's factual findings and findings of FPC in the instant case, and because of the Court's refusal to apply the legally applicable Rule of Reason. This error is discussed in the Argument *infra*, p. 72.

The denial by this Court of certiorari in that case "lends no support to the decision" of the Fourth Circuit in that case.[25]

5. THE SAFE HARBOR CONTRACT OPINION OF THE FOURTH CIRCUIT

It should be remembered that the Safe Harbor Contract, except as to rates, had, by Opinion No. 143 and order of November 4, 1946, been prescribed in its entirety by FPC as Safe Harbor's filed tariff (5 F. P. C. 221). This order was affirmed by the Third Circuit (which found the contract to be "exemplary") in 179 F. 2d 179 (1949), Cert. den. 339 U. S. 957 (1950).

The Safe Harbor Contract was, likewise by summary judgment (again assuming the Court's jurisdiction to do so), held to be "invalid on its face" despite the existence of material issues of fact.

Four minor provisions in the contract, not one of which had in over 20 years been of any significance or had any

[25] See Memo of Mr. Justice Frankfurter in denial of certiorari in *Agoston v. Commonwealth of Pennsylvania*, 340 U. S. 844 (1950).

practical effect, were found to make the entire agreement *per se* illegal.

The provisions so held illegal are these. Article IIIa required Safe Harbor to *expand* its plant when *both* of its owners reasonably request it to. Article IIIa also in effect gave its two owners an option on output from such plant expansion. Both of these provisions are academic because even Penn Water's officers agree that the present Safe Harbor Plant utilizes all of the river flow up to 65,000 cubic feet per second; that flow exceeds that amount on an average of only 54 days a year; and that the installation of additional generators would not be economically feasible. Article IV, properly read in its context, prevents only such separate agreements between Safe Harbor and either one of its two owners as would injure the over-all efficiency of the operation. Article XIV provides for an "Operating Committee" for "investigation, consultation and advice," but with no powers to *bind* Safe Harbor.

a. On the basis of these ancillary and academic provisions—which in 20 years had never been invoked, — the contract was *summarily* stricken down in its entirety (assuming the Court's jurisdiction to do so), even in the face of Consolidated's affidavit that the provisions were immaterial, separable, and the contract fully operable without them.

b. As in the Baltimore Contract case, the Court found that FPC had not prescribed the restrictive provisions, despite FPC's contention that in this, the Safe Harbor case, it actually had.

c. The Court also found that its judgment directly affected the FPC-prescribed Safe Harbor tariff, saying:

> "Further proceedings before the Federal Power Commission will doubtless be necessary if it is ultimately decided that the three party basic contract

> [Safe Harbor Contract], as well as the two party basic contract [Baltimore Contract] is invalid; but that course need not involve embarassment."

d. It expressed disagreement with the opinion of the Court below in the case at bar as to the relationship between the antitrust laws and the Federal Power Act.

The Court condemned the contract under the Pennsylvania Public Utility Law (apparently the section authorizing transfers of franchises, etc., only *with Commission approval*) although at the outset of its opinion the Court said:

> "These two utilities [Consolidated and Penn Water] are its [Safe Harbor's] only customers under an arrangement *approved by the Pennsylvania Commission.*" (Emphasis added.) (Pamphlet copy of Opinion, pp. 4-5.)

Consolidated submits that the Fourth Circuit was in error in invalidating this contract, which had been prescribed in its entirety by FPC as a tariff and affirmed by the Third Circuit. Even though that Court's decision in the Baltimore Contract case were admitted to be correct, which it is not, and that the Fourth Circuit had jurisdiction, which it did not, the Court was in error in striking down the Safe Harbor Contract because of the entirely different nature of provisions of the latter contract, e.g.: its creation of a new project; the physical limitations on the expansion of that project; the charter and franchise and certificate limitations on Safe Harbor; the approval of the Safe Harbor project by the Pennsylvania Commission, and its approval of the sale of Safe Harbor's output to its two owners (which latter approval is actually stated by the Fourth Circuit in its Safe Harbor Contract Opinion). The Court erred in summarily striking down this contract because

of the exclusive primary jurisdiction of the Federal Power Commission to determine the disputed factual issues of potential competition, price fixing, and other issues material to the validity of the contract, as well as issues as to the Safe Harbor Contract's separability from the Baltimore Contract, and the separability of its own immaterial and academic "restrictions" on the balance of the contract. This error is discussed in the Argument, *infra*, pp. 69-73.

Consolidated and the Maryland Commission have petitioned this Court for certiorari in the Safe Harbor Contract case, which are Cases 611 and 612 in the current term of this Court.

6. THE PRACTICAL RESULTS OF PENN WATER'S OBJECTIVES

Penn Water contends that the Baltimore and Safe Harbor Contracts have been destroyed and that the FPC rate reduction order has consequently been annulled. Nowhere does Penn Water suggest the obvious argument that if the FPC order, prescribing a *new* tariff which *excludes* Articles IV and V, is unlawful, then, *a fortiori*, Penn Water's *present* filed FPC tariff, which *includes* those Articles, is also unlawful. Penn Water has furnished services to Consolidated from 1931, and is now furnishing such service under the present filed tariff. Thus, Penn Water actually is asking this Court to create a complete regulatory "vacuum", as Judge Miller's dissent suggests. This vacuum presumably would continue until such uncertain time in the future as Penn Water might file and FPC might approve a new tariff or until a new tariff would be imposed on Penn Water by FPC.

Or does Penn Water's silence on this aspect of the case indicate that, if successful here, it would insist on the full effectiveness of its present filed tariffs despite its inclusion

of all of the alleged "restraints"); claim the right to retain the excess charges impounded by it since February 1, 1949 under the $1,954,261 rate reduction order; and continue collecting such excessive rates until the establishment of a new tariff? Penn Water states that final determination of any new schedules will only be achieved after "confusion and delay" and "probably after several appeals" (PW Br., p. 41).

7. CONSOLIDATED'S POSITION

Consolidated did not originate the present arrangement. Over the years it has cooperated with Penn Water, at the latter's solicitation, in making Penn Water's and Safe Harbor's fluctuating output 100% marketable and in building up a physical system, the efficient operation of which in the public interest has been acclaimed not only by Penn Water, but by Commissions and Courts alike.[26] Consolidated has planned its own facilities in coordination with that system, and has provided many millions of dollars of plant and equipment at Baltimore both to "firm up" the unfirm hydro and to receive delivery thereof.

It believes that the present operations of the system are highly beneficial to the public. FPC regards them as so beneficial as to have prescribed their continuance. The Fourth Circuit admits that they are "practicable and successful".[27] Consolidated has continued to "firm up" Penn Water's hydro and to operate its own facilities so there will be no interruption to or curtailment of the public service—notwithstanding the Fourth Circuit's decisions.

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[26] R., Vol. 1, pp. 25-27, 31-32, 75-77; Opinion 173, 8 F. P. C. 1, 14; Opinion 173-A, 8 F. P. C. 170, 174-176; *Safe Harbor Water Power Corp. v. FPC* (CA 3, Dec. 30, 1949), 179 F. 2d 179, 199.

[27] *Consolidated Gas Electric Light & Pr. Co. et al. v. Penn Water & Pr. Co. et al.* (CA 4, Jan. 3, 1952). Pamphlet copy furnished by Petitioners, pp. 12-13.

It holds no brief for any special type of system arrangement, and assuredly will not (as Penn Water suggests it may — PW Br., p. 53) abruptly stop its receipts or deliveries of power.

Its primary concern remains what it was before FPC and the Court below — the protection of its share of cheap Safe Harbor power.

Having made possible the Safe Harbor project, borne the burden of that project during the many years when power was in excess supply, and having provided the expenditure of millions of dollars for the receipt at 220,000 volts, and transformation of Safe Harbor power, it has sought to retain what the Fourth Circuit itself in the Safe Harbor Contract case, has called its "rightful entitlement in Safe Harbor's production", "its ownership in the power purchased of Safe Harbor", its "share".

The Fourth Circuit's assurance to Consolidated of Penn Water's "desire to continue to supply electric energy to Consolidated" (R., Vol. 18, p. 40) was based on a similar assertion to that Court which Penn Water repeats at page 26 of its Brief in Opposition to Certiorari in the Safe Harbor Contract case Nos. 611 and 612 of the current term. Even were this offer a binding commitment, it is no more than an offer by Penn Water to retain all that part of Consolidated's ⅔ interest in Safe Harbor's output which Consolidated has, upon being compensated therefor, permitted Penn Water physically to divert into Pennsylvania. Penn Water's present "offer" is to continue the diversion, but to stop any compensation to Consolidated for it. This is what Penn Water calls "the same *services* Consolidated has been receiving". The Fourth Circuit could hardly have approved this offer had it understood it.

8. CHEAP SAFE HARBOR POWER

The Safe Harbor plant is modern, efficient, and was built very cheaply at the depth of the Depression in 1930-31. It has nearly twice the capacity of Penn Water's Holtwood hydro and steam plant with approximately the same investment.

Penn Water has attacked Consolidated's share in Safe Harbor's output for three reasons: (1) to avoid FPC jurisdiction over alleged "joint sales" by Penn Water and Safe Harbor (PW Br., p. 8). (This contention was found "wholly without substance" by the Commission, R., Vol. 16, pp. 4862-4863, Vol. 17, p. 5269, and by the Court below, 193 F. 2d Adv. Sh. at p. 245, R., Vol. 18, p. 5391, but is renewed here (PW Br., p. 56)); (2) to annul the entire FPC rate reduction order; and (3) to aid the physical diversion into Pennsylvania of cheap Safe Harbor power so that it may be combined with Penn Water's own more expensive power.

In its brief in the Court below, Consolidated's argument was directed primarily at the preservation of its ⅔ share of Safe Harbor output, pointing out the repeated confirmation of that right by Safe Harbor, by Penn Water, by Penn Water's Pennsylvania customers, by the FPC, by the United States Court of Appeals for the Third Circuit, and by all of the affirmative testimony in this case. The Court below fully sustained Consolidated's position.

Consolidated's basic concern in this entire litigation has been and remains the protection of its ⅔ share of the cheap Safe Harbor hydro.

In the Safe Harbor Contract case, Consolidated's affidavits in opposition to summary judgment showed that the incidental "restraints" in the Safe Harbor Contract had not come into operation in 20 years; were of no significance in

the operation of the Safe Harbor plant; that such plant cannot now be economically enlarged; that such academic "restraints" are of no importance to continued operations under the contract; that in this respect (and others) they have no resemblance to Articles IV and V of the Baltimore Contract, and that they are clearly severable. Penn Water, however, insisted on invalidation of the entire contract, which, of course, included the very material contractual division of Safe Harbor output ⅔ to Consolidated and ⅓ to Penn Water.

Nowhere does Penn Water attack the validity of a tariff which prescribes that Consolidated shall be entitled to ⅔ of Safe Harbor's output and Penn Water to ⅓. Nowhere has the Fourth Circuit found such a provision invalid, whether in a tariff or in a contract. On the contrary, in the Safe Harbor Contract case, the Fourth Circuit adopted the language of the District Court in referring to this "share" as Consolidated's "rightful entitlement".

SUMMARY OF ARGUMENT

I. *The Fourth Circuit Had No Jurisdiction To Annul Either the Prescribed and Affirmed Safe Harbor Tariff or the FPC Order Prescribing the Penn Water Filed Tariff as Amended.*

The Fourth Circuit had no jurisdiction summarily to strike down, directly or indirectly, in a collateral action to which the Federal Power Commission was not a party, a tariff prescribed by that Commission and affirmed by the Third Circuit with certiorari denied (the Safe Harbor tariff), or an order of that Commission which prescribed a filed tariff as amended (the Penn Water tariff). The Fourth Circuit had no jurisdiction summarily, and without preliminary resort to the primary jurisdiction of the Federal

Power Commission, to pass on the validity of service contracts the provisions of which, as amended, were prescribed in whole (the Safe Harbor Contract) or in part (the Baltimore Contract) as tariffs by FPC. *Far East Conference, et al. v. United States of America & Federal Maritime Board* (March 10, 1952), No. 15 Misc., Oct. Term, 1951.

Such FPC orders, after protracted investigations and hearings, and affirmance as to the Safe Harbor tariff, by the Third Circuit, should conclusively establish that the contract provisions are not unlawful *per se* on their face, as the Fourth Circuit purported to find, and are strongly persuasive as to their lawfulness under the Rule of Reason. Such issue, in any event, is subject to FPC's primary jurisdiction.

II. *The Federal Power Commission Had Authority to Prescribe the Tariff.*

The Federal Power Act empowers the FPC to order physical connections between utilities, the sale and exchange of energy between them, to prescribe the terms and conditions of the arrangements to be made between the persons affected by such order, including apportionment of costs, compensation, and reimbursement; to approve dispositions, consolidations, acquisitions or control consistent with the public interest; to determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force and to fix the same by its order; to determine the proper, adequate, or sufficient service to be furnished and fix the same by its order, and to bring actions to enjoin violations of the Act or orders of the Commission, or to compel compliance.

Under such powers of "comprehensive and detailed regulation", the Federal Power Commission had ample authority to prescribe the tariff here assailed by Petitioners.

Moreover, the Sherman Act does not apply to tariffs prescribed by the Federal Power Commission even assuming that such tariffs prescribe (which they do not) actions which would be unlawful under an independent contract between private parties. *Parker v. Brown*, 317 U. S. 341 (1943).

III. *The Federal Power Commission Has Primary Jurisdiction.*

Under its comprehensive authority, the Federal Power Commission has primary jurisdiction to ascertain and interpret the circumstances underlying legal issues, and to determine questions essential to the proper determination of the lawfulness of its own orders and of the tariffs which it prescribes. *United States Navigation Co., Inc. v. Cunard S.S. Co., Ltd.*, 284 U. S. 474 (1932); *Macauley v. Waterman S.S. Corpn.*, 327 U. S. 540 (1946).

The disputed but untried factual issues of "potential competition", alleged "restraints", separability, system operations, and similar questions within this field of government-regulated monopoly, all within the expert competence of the Federal Power Commission, should not have been summarily decided by the Fourth Circuit (as they were) without either evidence thereon or reference to the Federal Power Commission.

IV. *The Federal Power Commission Prescribed a Lawful Tariff.*

The Federal Power Commission orders here assailed by Petitioners prescribe a tariff, and do not, as contended, constitute a blanket authorization to private parties to enter into or continue independent contracts at their "whim". The cases cited by Penn Water with reference to laws which authorize private parties independently to negotiate con-

tracts, and which exempt from the Sherman Act the contracts so privately negotiated are thus not in point. The Federal Power Commission orders prescribed a tariff applicable to continuing physical operations which would not be, and were not, affected by any determination of the 11th-hour question raised by Petitioners, long after the record was closed, as to the lawfulness of service contract provisions. The Fourth Circuit's decision that Articles IV and V of the Baltimore Contract are unlawful (assuming the Fourth Circuit's jurisdiction so to find) does not annul the tariff prescribed by FPC which excluded those provisions.

Consolidated is required to pay for and is entitled to ⅔ of the output of the Safe Harbor plant under the Safe Harbor filed tariff which was prescribed in its entirety by the Federal Power Commission,[28] affirmed by the Third Circuit,[29] and cert. denied.[30] The prescribed apportionment based on this tariff entitlement was lawful and, under the doctrine of the "filed tariff", cannot be collaterally attacked. *Montana-Dakota Utility Company v. Northwestern Public Service Co.*, 341 U. S. 246 (1951); *Keogh v. C. & N. W. R. Co.*, 260 U. S. 156, 161-162 (1922). No Court or Commission has found such entitlement to be unlawful. The allocations under the Penn Water tariff are based on complicated, technical considerations involved in the integrated operations of the interstate electric system, and Consolidated's obligation (not shared by Penn Water's other customers) to provide steam-electric generating capacity with which to "firm up" Penn Water's unfirm, unreliable run-of-river hydro-power. The question of allocations is one of fact to be determined at the administrative level. *Colorado Interstate Gas Company v. FPC*, 324 U. S. 581, 589-591 (1945).

[28] 5 F. P. C. 221 (1946).
[29] 179 F. 2d 179 (1949).
[30] 339 U. S. 957 (1950).

Allocation of a rate reduction does not affect the total amount of the reduction, and Penn Water's other customers have not complained.

The prescribed payment provisions are lawful. No Commission or Court has found them otherwise. Consolidated did not originate them, and, in this case, Penn Water's officers urged them upon the Commission as the only practical means of effecting full economic utilization of Penn Water's hydro facilities.

The payment provisions are not revenue pooling. There is no division of gross or net earnings, nor formula for division or pooling of any kind. This same argument was made unsuccessfully before the Fourth Circuit and before the Court below.

V. *FPC Did Not Authorize An Unlawful Contract.*

The FPC orders prescribed a tariff; they did not authorize a private contract.

The cases cited by Penn Water in support of the proposition that *private parties* cannot generally be granted immunity from the anti-trust laws, and cannot be authorized to enter into *private contracts* in violation of such laws, have no application to a tariff prescribed by FPC. But even if this were not so, the Fourth Circuit clearly erred in summarily striking down on their faces the Safe Harbor and Baltimore Contracts. The Safe Harbor Contract was a means of creating the entirely new Safe Harbor project, and for the sale to its two owners of its output in proportion to their ownership. Its provisions were fully known to the Pennsylvania Commission, the Maryland Commission, and FPC. Even now, the Pennsylvania Commission forbids the resale of Safe Harbor power by Penn Water to the public. After 20 years, Penn Water, as part of its effort to

avoid the FPC rate reduction against it, assailed the Safe Harbor Contract because of minor and ancillary alleged "restraints" in that contract which had never been of any significance, and which Consolidated pointed out were readily severable.

Despite the fact that this contract constituted Safe Harbor's filed and prescribed FPC tariff which had been affirmed by the Third Circuit and as to which certiorari had been denied by this Court, the Fourth Circuit summarily and without any testimony or referral to FPC found it invalid, *per se*, under the Sherman Act, without any determination of its reasonableness under the Rule of Reason.

Entirely apart from Safe Harbor's charter, franchise, certificate, and physical limitations to the generation of unreliable "run-of-river" hydro and the sale of its entire output to its two owners, the Fourth Circuit determined that this newly-created source of power must compete with its two owners. No decisions of this Court support any such ruling. For many of the same reasons, the Fourth Circuit erred in summarily striking down the Baltimore Contract.

These contracts, moreover, enabled both Penn Water and Safe Harbor to make full utilization of their hydro facilities, assured them of substantial income throughout the Depression (during which they were executed), and afterwards made possible in the case of Penn Water, the payment of very large dividends as well as the amassing of a substantial surplus, with the full knowledge and approbation of its stockholders and of the Pennsylvania Commission. They provide no ground for their summary invalidation by the Fourth Circuit under the Laws of Pennsylvania.

ARGUMENT

I.

The Fourth Circuit Had No Jurisdiction to Annul Either the Prescribed and Affirmed Safe Harbor Tariff or the FPC Order Prescribing the Filed Penn Water Tariff as Amended.

This case presents for review Orders of the FPC prescribing a tariff.

The Petitioners attack the tariff so prescribed on the ground that it has been annulled by judgments of the Fourth Circuit in collateral actions to which FPC was not a party.

Under the recent decisions of this Court in *Far East Conference, et al. v. United States of America and Federal Maritime Board* (March 10, 1952),[31] the Fourth Circuit had no jurisdiction to strike down, directly or indirectly, in a collateral action to which FPC was not a party, any tariff either approved or prescribed by FPC. That case clearly decides that the Fourth Circuit lacked power even to rule on the validity of the service contracts, *qua contracts*, without "preliminary resort" to FPC because of that Commission's primary jurisdiction over and its specialized experience and knowledge in this entire field.

Assuredly, the Fourth Circuit had no jurisdiction to strike down the Safe Harbor tariff which FPC had prescribed (5 F. P. C. 221), which the Third Circuit had affirmed (179 F. 2d 179), as to which certiorari had been denied by this Court (339 U. S. 957), and under which services continue to be supplied. But the Fourth Circuit purported to do exactly that in the Safe Harbor Contract case, in which petitions for certiorari are now pending before

[31] No. 15 Misc., October Term 1951, 20 L. W. 4207.

this Court in Case Nos. 611 and 612 of the current term. And that is exactly what Petitioners here contend that the Fourth Circuit did do.

Assuredly, the Fourth Circuit had no jurisdiction to strike down the Penn Water tariff which had been on file with FPC since 1936; which, as amended, was prescribed by FPC by the orders here assailed; and under which services continue to be supplied. Yet that is exactly what the Fourth Circuit purported to do in the Penn Water Contract case. And that is exactly what Petitioners here contend the Fourth Circuit did.

If, as decided in the *Far East Conference* case, the administrative board or commission has primary jurisdiction with respect to the legality of tariffs which have *not* been filed, *a fortiori* in this case, it has primary jurisdiction with respect to a tariff which has not only been filed, but which has been prescribed in its entirety (with rate reduction), and affirmed on appeal (the Safe Harbor tariff), or which has been filed and prescribed as amended (the Penn Water tariff).

In both the Baltimore Contract case and the Safe Harbor Contract case, the Fourth Circuit purported summarily to strike down, as unlawful on its face, a tariff which FPC had prescribed after protracted investigations. Without so much as an inquiry to FPC as to the fundamental factual issue of the existence of "potential competition" (which FPC, the Maryland Commission, and Consolidated all deny), that Court accepted Penn Water's untried proffers and purported to strike down the tariffs because they "restricted" that non-existent "potential competition". The Fourth Circuit refused to consider the effect of FPC's orders in this field of Government-regulated monopoly even as *prima facie* evidence that the assailed provisions were not

unlawful, *per se*. It refused to consider the effect of FPC's orders as evidence that the assailed provisions are lawful under the Rule of Reason, and desirable in the public interest.

Judge Miller's dissent asserts that the Fourth Circuit's opinion actually struck down as unlawful the physical integrated, interstate electric system, saying:

> "Welding the facilities of the two companies into one integrated system — the Commission's objective — is not conducive to competition" (R., Vol. 18, p. 5412).

The Commission, on the contrary, found that such:

> "* * * regional integration and coordination of facilities, the resulting economies, and the utilization and conservation of natural resources thus achieved are precisely what was sought to be encouraged and fostered by the Federal Power Act and established as a part of the criteria of the public interest to be served by regulation thereunder" (8 F. P. C., at p. 175, R., Vol. 16, p. 5184).

It is submitted that under the well-established doctrine of primary jurisdiction, the Fourth Circuit was without jurisdiction to take any collateral action which would affect, directly or indirectly, the tariffs or orders promulgated by FPC, and that in so far as Petitioners' attack on the orders of FPC are based on their collateral actions in the Fourth Circuit, that attack must fail. The primary jurisdiction of FPC, under its sweeping statutory powers of regulation, prevents collateral nullification of its orders and tariffs. The decisions of the Fourth Circuit which Petitioners here seek to use to that end are completely ineffective for that purpose.

The primary jurisdiction of the FPC (considered more fully, *infra*, pp. 55 *et seq.*) disposes of the question which

Penn Water asserts is "the primary issue in this case" (PW Br., p. 3).

The entire balance of this Argument, which is in response to Penn Water's Argument, should therefore be considered in the light of, and subject to, this fundamental jurisdictional principle. Notwithstanding that the actions of the Fourth Circuit will hereinafter be discussed, *arguendo*, as though made by a Court of competent jurisdiction, the total invalidity of such actions should dispose of Petitioners' case on this main issue without further argument. What follows is submitted to demonstrate that the Petitioners' contentions are erroneous even assuming, *arguendo*, the jurisdiction of the Fourth Circuit in the premises.

II.

The Federal Power Commission Had Authority to Prescribe the Tariff.

Penn Water seeks to minimize the broad authority of the Federal Power Commission under the Federal Power Act[32] by repeatedly referring to the "mere general regulatory provisions" of that Act (PW Br., pp. 21, 25, 28, 32), and by asserting that it contains only "ordinary regulatory provisions" (p. 35). On the contrary, the Court below correctly points out (R., Vol. 18, pp. 5371, 5373) that Congress in the Federal Power Act "has substituted [for competition] a regulatory agency authorized to supervise almost every phase of the regulated company's business", and has provided "for comprehensive and detailed regulation * * *".[33]

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[32] Title II, Public Utility Act of 1935, Secs. 202-209, 301-20, Chap. 687, 49 Stat. 803, 838; 16 U. S. C. Secs. 791-825.

[33] *First Iowa Hydro-Electric Coop. v. FPC*, 328 U. S. 152, 164 (1946); *FPC v. Arizona Edison Co., Inc.* (CA 9, Feb. 12, 1952), — F. 2d — (not yet reported).

As examples of the broad authority granted to FPC, it will suffice merely to refer to a few provisions of the Act.

Section 202(b) (16 U. S. C., sec. 824a(b)) of the Act empowers the Commission to order physical connections between utilities and the sale or exchange of energy between them and to "prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them".

Section 203(a) (16 U. S. C., sec. 824b(a)) authorizes FPC to approve any "disposition, consolidation, acquisition, or control" which is "consistent with the public interest".

Section 206(a) (16 U. S. C., sec. 824e(a)) authorizes the Commission to "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force" and to "fix the same by order".

Section 207 (16 U. S. C., sec. 824f) authorizes the Commission, subject to certain conditions, to "determine the proper, adequate, or sufficient service to be furnished", and to "fix the same by its order, rule or regulation".

Section 314(a) and (b) (16 U. S. C., secs. 825m(a) and (b)) empowers the Commission itself to bring an action to enjoin any violation of the Federal Power Act or of any rule, regulation, or order of the Commission thereunder, and to obtain writs of mandamus to compel compliance with the Federal Power Act or any rule, regulation or order of the Commission thereunder.

Under the extensive powers so conferred on FPC by the Federal Power Act, that Commission had ample authority to prescribe the tariff here assailed. Penn Water, how-

ever, eschews any reference to the fact that the order it assails prescribes a tariff. Instead, it asserts that such order was an attempted grant by FPC to private individuals of an immunity from the Sherman Act with respect to their private "contractual arrangements."

On the contrary, the specific operative order here assailed is FPC's Order of October 25, 1949, "Prescribing Rate Schedules" (R., Vol. 17, p. 5267). Consonant with the invalid premise of its argument, the cases cited by Penn Water, e.g., the *Borden*, *Georgia*, and *Alkali* cases[34] (PW Br., p. 20) all relate to the independent actions of private individuals, companies, or associations. None of them is applicable to a tariff prescribed by an administrative agency such as is here involved. In fact, in the Georgia case, this Court carefully limits the effect of its decision to the independent action of private parties and avoids any effect on a filed tariff (324 U. S., at pp. 460-61).

However, even if FPC in its tariff order had prescribed (which it had not) provisions which would be unlawful under the Sherman Act as a private contract between independent individuals, the tariff so prescribed would not be subject to the Sherman Act. This was the holding of *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156 (1922), which was reaffirmed by both the majority and dissenting opinions of this Court in the *Georgia* case (324 U. S. at pp. 453, 482).

In *Parker v. Brown*, 317 U. S. 341 (1943), this Court determined that the Sherman Act was a prohibition of individual and not of State action, and that actions which would violate the Sherman Act if made effective solely by virtue of a contract by private persons were not unlawful under the

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[34] *United States v. Borden Co.*, 308 U. S. 188 (1939); *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945); *United States v. Alkali Export Assn.*, 325 U. S. 196 (1945).

Sherman Act if such actions derived their authority from legislative command of the State.

Penn Water seeks to distinguish that case (PW Br., p. 39) on the ground that the action there found lawful had been prescribed by a State but that prescription by FPC (which is not a State) would have no such efficacy. This argument is answered by *United States v. Cooper Corporation*, 312 U. S. 600 (1941), in which this Court held that the United States is not subject to the Sherman Act, saying (at p. 607):

> "* * * In §§1, 2, and 3 the phrase designating those liable criminally is 'every person who shall' etc. In each instance it is obvious that while the term 'person' may well include a corporation it cannot embrace the United States."

III.

The Federal Power Commission Has Primary Jurisdiction.

Under such sweeping statutory authority, FPC has, indeed, "comprehensive and detailed" control of this interstate power system, its operations, the parties to it and their relations with each other.

The Court below made the sound procedural determination, under established administrative law,[35] that Petitioners could not present to the Court of Appeals for the first time, as a basis for annulling the FPC's rate reduction orders, questions (a) which Petitioners had ignored during the course of the lengthy hearings before the Commission; (b) which they had subsequently made the basis of a collateral Court proceeding to which FPC was not a party;

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[35] *Aircraft Diesel Equipment Corpn. v. Hirsch*, 331 U. S. 752 (1947); *Macauley v. Waterman S. S. Corpn.*, 327 U. S. 540 (1946); *FPC v. Metropolitan Edison Co.*, 304 U. S. 375 (1938); *Myers v. Bethlehem Shipbuilding Corpn.*, 303 U. S. 41 (1938).

(c) which the Fourth Circuit in that proceeding decided without regard to FPC's primary jurisdiction; and (d) as to which the Federal Power Act prescribes a proper procedure for presentation in the first instance to the Commission.

In the *Far East Conference* case, *supra*, this Court defines what it calls a "firmly established principle", as follows:

> "* * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The instant case, like the *Far East* case, involves questions clearly within the "general scope" of the administrative commission's jurisdiction. Even the dissent in the *Far East* case stated that:

> "If the rates *were filed*, of course the Board would have exclusive jurisdiction to pass on them." (Emphasis added.)

Here it is not the United States (as it was in the *Far East* case) which contends that the tariff is unlawful, but the very utility which originally filed the tariff and which, by

its present contention of illegality, seeks to annul a rate reduction order as to it.

Assuredly, the factual questions of potential competition, alleged "restraints", separability, the public benefits to be derived from operations of the interstate power system and the relationship of the tariff to such operations, exemplify the very type of technical and complicated "circumstances underlying legal issues" which demand the "ascertaining and interpreting" by an expert body such as FPC. Such issues cannot be, and should not have been, summarily determined by a Court from the face of a contract and a map, as was done in the Baltimore Contract case by the Fourth Circuit (assuming jurisdiction), or on disputed but untried issues of fact and the same map, as was attempted by the Fourth Circuit in the Safe Harbor Contract case, in neither of which cases was FPC a party.

Moreover, this Court regards the doctrine of "primary jurisdiction" as not being confined to questions of fact, but as being applicable to mixed questions of law and fact, and to questions of law with which the administrative agency is peculiarly equipped to deal.[36]

In asking this Court to annul the FPC's orders because of the Fourth Circuit's collateral decisions, without consideration of FPC's views thereon, Petitioners ask this Court to determine an issue which lies within FPC's primary jurisdiction and thereby to contravene the rule laid down in the above cases.

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[36] *Macauley v. Waterman S.S. Corp., supra; National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 130-31 (1944); *Dobson v. Commissioner*, 320 U. S. 489, 501-02 (1943); *Gray v. Powell*, 314 U. S. 402, 412 (1941); *Myers v. Bethlehem Shipbuilding Corp., supra; Miles Laboratories, Inc. v. Federal Trade Commission*, 140 F. 2d 683, 685 (1944), cert. den. 322 U. S. 752 (1944).

IV.

The Federal Power Commission Prescribed a Lawful Tariff.

The orders of FPC which reduced Penn Water's rates nearly $2,000,000 a year, by their terms, prescribed a tariff or rate schedule. The attack which is here leveled against those orders carefully avoids any reference to them as tariffs and, instead, assails them as an authorization given to private parties to enter into or continue independent "contractual arrangements" at the "whim" of such private parties. The wide distinction between a prescribed tariff and a private contract is ignored. That the tariff so prescribed is lawful appears from the following facts.

A. The Tariff Was Restricted to Provisions "In and Of Themselves Lawful".

When Penn Water first attacked the rate reduction orders in its petition to FPC for rehearing; on the ground of the alleged unlawfulness of its service contracts, FPC carefully pointed out that it had prescribed a tariff which was limited to provisions relating to physical operations and "in and of themselves lawful", and that only such provisions should "be observed and be in force" (R., Vol. 17, p. 5283)

B. Articles IV and V Were the Only Provisions of the Baltimore Contract Purportedly Found by the Fourth Circuit to be Unlawful "In and Of Themselves".

The many statements in the Fourth Circuit's opinion, quoted *supra* at pages 31 *et seq.*, fully establish this fact (assuming its jurisdiction so to find). The following is but an example:

> "The restrictions which are imposed upon the activity of Penn Water by the agreement and *give rise to*

the contention of invalidity are contained in Articles IV and V * * *" (184 F. 2d at p. 557, R., Vol. 18, p. 5328). (Emphasis added.)

C. Articles IV and V Were Not Prescribed by FPC.

1. If assumed to be "unlawful".

Assuming, *arguendo*, the jurisdiction of the Fourth Circuit to determine this issue, and the correctness of its determination of the unlawfulness of Articles IV and V, they were specifically excluded from the tariff by the language of the FPC order limiting that order to provisions "in and of themselves lawful".

2. Because they do not relate to "any service to be furnished".

The order of FPC carefully pointed out that it had prescribed a tariff which related to services actually being rendered and had ordered only those provisions "prescribing or defining" the "service to be furnished" (R., Vol. 17, p. 5283). Articles IV and V neither prescribe nor define "any service to be rendered", and the FPC order thus, by its terms, excluded them.

3. Because FPC denies they were prescribed.

The FPC itself has denied that it prescribed Articles IV and V. See Memorandum of FPC on petition for certiorari in this case, pages 24, 25.

4. Because the Fourth Circuit (assuming its jurisdiction) so found.

The Fourth Circuit said: "It is obvious that the Commission did not prescribe the restrictive conditions of the contract as part of the rate order * * *."

5. Because service has continued.

The services supplied to Consolidated by Penn Water have continued without change. Neither Article IV nor V is essential to or affects Penn Water's physical operations, its deliveries of electricity, or its rates therefor, as ordered by FPC.

D. The Allocations Prescribed by the FPC Tariff Are Lawful.

Penn Water contends that the FPC allocations are unlawful because they are based on Consolidated's "entitlements" which allegedly succumbed with the contracts. No one contends that the entitlements, as such, are unlawful.

1. The entitlement to ⅔ of Safe Harbor power is established by tariff ordered by FPC.

The Safe Harbor tariff, prescribed by FPC by its order of November 4, 1946 (5 F. P. C. 221), provides that Safe Harbor sell its entire output to its two owners, ⅓ to Penn Water and ⅔ to Consolidated, and requires those two companies to pay all of Safe Harbor's expenses and return in the same proportions.

This tariff was sustained on appeal by the Third Circuit December 30, 1949 (179 F. 2d 179) and certiorari denied by this Court (339 U. S. 957).

2. The doctrine of the "filed Tariff" prevents collateral attack thereon.

This Court recently reaffirmed the well-established doctrine of the "filed tariff" by saying that a customer "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity

on other terms". *Montana-Dakota Utility Company v. Northwestern Public Service Co.*, 341 U. S. 246 (1951).

The doctrine that the filed tariff constitutes the only lawful rate and *terms of service* between a utility and its customers, when the filing of such tariff is required by statute, was early established and uniformly recognized in cases involving regulation of carriers by the Interstate Commerce Commission.

Texas & Pacific Ry. v. Mugg, 202 U. S. 242 (1906);
Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 439-449 (1907);
Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 566, 573 (1921);
Davis v. Henderson, 266 U. S. 93 (1924).

And in *Keogh v. C. & N. W. R. Co.*, 260 U. S. 156, 163 (1922), this Court said:

> "* * * The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between shipper and carrier. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier. * * *"

Penn Water's footnote denial of this fundamental principle (PW Br., p. 55) is not, and cannot be, supported by any decision of this Court, and its collateral assault in this case on the Safe Harbor tariff by attack on the Safe Harbor Contract can therefore have no affect on that tariff.

Safe Harbor receives no revenue from any customer other than its two owners, Consolidated ⅔ and Penn Water ⅓ (R., Vol. 6, pp. 2526-2528; Vol. 10, p. 3778; Vol. 13, p. 4222; Vol. 14, p. 4492).

So long as Consolidated is required by that tariff, as it has been continuously since the FPC order of November 4, 1946, to pay ⅔ of Safe Harbor's expenses and return, Penn Water should not be permitted to divert to its own use any part of Consolidated's entitlement under that same tariff to the ⅔ of Safe Harbor's output for which Consolidated is required to pay.

The recent decision of this Court in the *Far East Conference* case, *supra*, in denying to the Government the right to seek court determination, prior to Commission determination, of a steamship company's dual rate system (which rates were not even on file as a rate schedule) assuredly preserves in all its vigor the principle that a filed schedule or prescribed tariff cannot be collaterally attacked.

3. There is nothing unlawful in such proportional sale of Safe Harbor's entire output.

The FPC (5 F. P. C. 221), the Third Circuit ((1949), 179 F. 2d 179, at pp. 184-185), the District of Columbia Circuit in the opinion below (R., Vol. 18, pp. 5391-5392), and the Fourth Circuit (Safe Harbor Contract Opinion) have all found that Safe Harbor sells (as it must under its tariff) its entire output to its two owners in proportion to their ownership, ⅔ to Consolidated and ⅓ to Penn Water. In the Fourth Circuit's Safe Harbor Contract Opinion, it said:

> "These two utilities are its only customers under an arrangement approved by the Pennsylvania Commission."

As previously shown herein, the Fourth Circuit, in the Safe Harbor contract opinion, described the sale of Safe Harbor's entire output to its two owners "to be divided between them in proportion of two-thirds to Consolidated and one-third to Penn Water" and calls this their "rightful entitlement in Safe Harbor's production".

Nowhere does that Court, nor for that matter do the Petitioners, claim that such a proportionate sale of an entire output is unlawful. On the contrary, the Court emphasized its lawfulness by clearly distinguishing these provisions from the alleged "restrictions" "which led to the condemnation of the agreement".

Moreover, Penn Water's present insistence (Br., p. 56) that "allocations of cost be on a delivered power basis (that is, on actual operations)" puts the cart before the horse. Present power deliveries are the *result* of the present tariffs. Penn Water now wants to reverse the process and make deliveries so established the basis of a change in the tariffs which established them. A simple statement will show the utter inequity of this proposal. Consolidated would, through the years, have insisted on physical delivery to it of its ⅔ of Safe Harbor power had it not been compensated under the tariff for its diversion to Penn Water. Penn Water now contends that that diversion should continue but that the compensation for it should stop!

4. Judge Miller's dissent.

At Penn Water's Brief, pp. 55-56, Judge Miller's dissent below is quoted to show the alleged impropriety of FPC's allocation of the rate reduction. Judge Miller there said that the FPC had concluded that "very substantial sales by Penn Water to others had really been for the account of Consolidated". In making this statement, Judge Miller was apparently oblivious to the following facts of Record:

(a) The fact that — quite contrary to the status of Penn Water's other customers—Consolidated provided all the "firming up" capacity during protracted periods of low river flow, which alone made it possible for Penn Water to sell firm power as it did to its other customers (R., Vol. 16, pp. 4857, 4859).

(b) The fact that, during the daily off peak periods throughout the low river flow seasons, Consolidated supplied most of the electricity that was sold by Penn Water under its firm contracts with its other customers (R., Vol. 16, p. 4860).

(c) The fact that in addition to this, Consolidated generated and supplied to Penn Water huge quantities of interchange energy which Penn Water in turn sold as interchange to its other customers (R., Vol. 12, p. 4156; Vol. 13, p. 4400).

(d) The fact that Penn Water collected from its Pennsylvania customers the payments for such huge quantities of electricity so supplied to it by Consolidated (R., Vol. 12, p. 4154).

(e) The fact that Penn Water also sold to its Pennsylvania customers and collected from them for huge quantities of Consolidated's ⅔ share of Safe Harbor's output (R., Vol. 13, p. 4400).

5. Allocation of the rate reduction does not change its total amount.

The allocation of the rate reduction among Penn Water's customers, is actually an academic one so far as Penn Water is concerned. Any change in the allocation of the reduction would not possibly affect the total amount of that reduction.

Penn Water contends that its customers in Pennsylvania were entitled to a larger part of the reduction than was allocated to them by FPC. Those customers have made no such claim either to FPC or to the Court below. Penn Water's argument ignores the vast difference between the "firm" power supplied to its Pennsylvania customers and its "what's left" power supplied to Consolidated.

6. Allocation is controlled by administrative finality.

The matter of allocations is one of fact to be determined at the administrative level.[37] The Court below determined that the Commission's findings in this respect were supported by substantial evidence (R., Vol. 18, p. 5392). Section 825-l of the Federal Power Act provides that "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." This should be determinative of this issue.

E. The Payment Provisions Prescribed by the FPC Tariff Are Lawful.

1. The Fourth Circuit did not find them to be unlawful.

Despite Penn Water's vigorous assault on the payment provisions in the Baltimore Contract case, the Fourth Circuit found no fault with them. It described those payment provisions in detail and clearly distinguished them from the allegedly illegal provisions in the Contract (186 F. 2d at p. 936; R., Vol. 18, p. 5358).

Even Judge Miller, in his dissent below, obviously regarded the payment provisions as lawful parts of the contract which the Fourth Circuit said must fall because of their close association with Articles IV and V. Judge Miller said (R., Vol. 18, p. 5412):

> "* * * This would leave in effect the contractual definition of Consolidated's residual entitlements and the *residual payment type of rate*. But the Fourth Circuit said those provisions were so closely associated with the *illegal restrictions* on the future activities of Penn Water that the whole contract was invalid. * * *" (Emphasis added.)

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[37] *Colorado Interstate Gas Co. v. FPC*, 324 U. S. 581, 589-91 (1945).

Despite Penn Water's similar vigorous assault on the similar prescribed payment provisions in the Safe Harbor Contract case, the Fourth Circuit again refused to find those provisions invalid, saying:

> "This provides in effect that Consolidated should be entitled to all the electric capacity and energy available to Penn Water from its plant at Holtwood on the Susquehanna and from Safe Harbor, and in return Consolidated agreed to pay Penn Water an amount equal to its operating expenses and a specified rate of return on Penn Water's invested capital; *and then followed the illegal restrictions* upon the activities of Penn Water which have *already been described.*" (Emphasis added.)

2. Penn Water itself recommended them to the Commission in this case.

Although Consolidated has no special concern as to the type of payment prescribed by FPC and did not originate the present method, it submits that Penn Water should not be permitted collaterally to strike down the rate reduction orders of FPC, because that Commission prescribed the method of payment which in this very case was claimed by Penn Water's own officers to be the only practical means of assuring the full economic utilization of Penn Water's hydro facilities.

Mr. John A. Walls, then President of Penn Water, so testified (R., Vol. 1, p. 26), as did also Mr. George W. Spaulding, then Vice-President and now President of Penn Water (R., Vol. 1, pp. 71, 74-75).

3. In any event, this Court should not consider this objection.

Section 825-l of the Federal Power Act provides that on appeal "no objection to the order of the Commission shall

be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do".

A fortiori, this Court should not be asked to consider Penn Water's present objection which not only were not urged by Penn Water in its application to FPC for rehearing, but which are the exact opposite of what was urged upon the Commission in this case by Penn Water's own officers.

4. The payment provisions are not "revenue pooling".

By its very terms, the concept of "revenue pooling" contemplates a joint pooling or combining of revenues and a division or sharing of the total. Under neither the Baltimore Contract nor the FPC order is any pooling of revenues prescribed. This same attack was leveled at the Baltimore Contract before the Fourth Circuit. It was leveled at FPC's order before the Court below. It was also leveled at the Safe Harbor Contract before the Fourth Circuit. Petitioners, however, cannot point to a single statement in any of the opinions in these cases that the payment provisions ordered by FPC are invalid either as "revenue pooling" or otherwise.

The Penn Water tariff payment provisions do not fit any definition of revenue pooling. There is no division of gross or net earnings. There is no formula for any division or pooling of any kind. If this payment provision, which has been operative as a filed tariff since 1936, were as Penn Water contends, one "for the pooling and division of earnings" (PW Br., p. 63), Penn Water could not, through the years, have earned a return so disproportionately higher than Consolidated's.

Penn Water contends that the prescribed payments are "unrelated to services", and goes so far as to assert "the specified return provisions of the Baltimore contract provide for payment even if no power at all is delivered" (PW Br., p. 66)! On the contrary, they are directly related to the power and energy produced by the flow of the Susquehanna River averaged over a 40-year period (R., Vol. 15, p. 4608). The tariff provisions prescribed by FPC, which establish a cost-plus or definite return, while not promoted or espoused by Consolidated, are assuredly not unlawful, and the many cases cited by Penn Water, relating to actual pooling of revenue, are not in point.

If Penn Water desires to change the payment provisions of the tariff prescribed by FPC, it may do so only through the appropriate and requisite administrative process.

F. The Newly Alleged "Invalidities".

Section I-C-2-(a) of Penn Water's Brief (pp. 59-63) alleges a whole array of illegalities which, it is now contended, "permeate the entire arrangement". Several of these allegations will be recognized as repetitious, but the rest are propounded for the first time in this Court and, are therefore subject to the ban of Section 825-l of the Federal Power Act, above quoted.

V.

FPC Did Not Authorize an Unlawful Contract

A. Under The Sherman Act

Parts I and II of Penn Water's Argument are based in their entirety on the unsound premise that the FPC rate reduction orders here assailed did not prescribe a *tariff* relating to the continuing physical operations of a physical system but, it is argued, were a grant to "private parties" of an immunity or "exemption" from the anti-trust laws and

a license to such private parties to enter into or continue independent "contractual arrangements" at their "own whim".

That the sole effect of the orders of FPC was to prescribe a *tariff* regulating rates in relation to continuing services cannot be gainsaid. The only real issue in this case is whether FPC had the authority to prescribe the tariff provisions which it did prescribe, irrespective of the existence or non-existence of a contract between *private parties.* The many cases cited by Penn Water in support of the proposition that *private parties* cannot generally be granted immunity from the anti-trust laws, and cannot be authorized to enter into or continue *private contracts* in violation of such laws, have no application to an order of a Federal regulatory agency which prescribes a tariff. Most of the cases cited at page 25 of Penn Water's Brief do not even involve regulated public utilities or tariffs. None of them annulled a tariff either prescribed or approved by a regulatory agency. The same observation applies to Appendix A of Penn Water's Brief.

But even if it were assumed, *arguendo*, that (a) FPC had authorized the continuance of private contracts by private parties, (b) had not prescribed tariffs, and that (c) the Fourth Circuit had primary jurisdiction to determine contract validity, it is submitted that the Fourth Circuit was clearly in error in summarily finding the Safe Harbor and Baltimore contracts invalid on their face.

The Safe Harbor contract provided for the financing of a wholly new project, the sale of its entire output to its two owners — (this was at that time actually required by the Pennsylvania Commission) — in proportion to their ownership, the construction by one of its owners of transmission lines for the delivery of such output to both owners, the

payment for such power by its two owners in proportion to their ownership so as to provide a 7% return to Safe Harbor on actual investment, the cooperation of the parties to encourage economy, the establishment of a joint Operating Committee to "investigate, consult and advise", and for arbitration of disputes.

For 18 years this contract operated efficiently and in the public interest with the full knowledge and approbation of FPC, the Pennsylvania Commission, and the Maryland Commission, with each of which it had been filed.

Then, in an avowed effort to upset the FPC rate-reduction order against Penn Water and to destroy Consolidated's right to ⅔ of Safe Harbor's cheap power, Penn Water denounced the Safe Harbor Contract as invalid because of alleged "restrictions" which for 20 years had never been operative or of the slightest significance. These are as follows:

Article III required Safe Harbor to install *additional* machinery or equipment at the request and for the benefit of *one* of its owners, provided the other approved.

The same Article in effect gave an option to its two owners to purchase the output from any possible additions at Safe Harbor, stipulating that sales of such additional output (except any which might be required for the performance of any duty or obligation to serve imposed upon Safe Harbor by its charter or otherwise by law) could not be made to any other person without the consent of its two owners. (By its Safe Harbor rate order, FPC required the two owners to pay the expenses of and return on any additional plant at Safe Harbor, thereby effectively prescribing this provision.)

Article IV prevented Safe Harbor from making separate, independent deals on the side with either owner individually which would work against the over-all economy — an implicit obligation of any such joint venture.

The Operating Committee provision was also alleged by Penn Water as a restriction despite the fact that under the very terms of the contract (and in actual operation), that Committee was advisory only, and could not and did not bind Safe Harbor.

The Fourth Circuit purported summarily to find these provisions (a) in violation of the Sherman Act, *per se*, (b) in violation of a Pennsylvania statute forbidding transfers of franchises without approval of the Pennsylvania Commission, and (c) in violation of common law and public policy — all in the face of clear-cut fundamental issues of fact. This Court has said that such a summary procedure presents "a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice". *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 257 (1948).

Safe Harbor would not have been built without the Safe Harbor Contract. Safe Harbor is limited by charter to producing unfirm, unreliable hydro power from the Susquehanna River. Before the contract was executed, Safe Harbor had been forbidden by the Pennsylvania Commission to sell its output to the public or to any customer other than its two owners. Safe Harbor has always been subject to FPC jurisdiction. Expansion of its plant is not economically feasible because of the characteristics of the river.

The Court summarily decided the issue of competition on the sole basis of the *location* of Safe Harbor's plant.

Invalidation of the Safe Harbor agreement, as *per se* violation of the Sherman Act, without a determination of reasonableness under the Rule of Reason, conflicts with *Standard Oil Company v. United States*, 221 U. S. 1 (1911), *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 728-29 (1944), *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), 338 U. S. 338 (1949), and *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948). Prescription of the Safe Harbor Contract as a tariff by FPC and affirmance by the Third Circuit is a clear indication that the contract complies with the Rule of Reason. Such application of the Rule of Reason would fully accommodate the Sherman Act and the Federal Power Act.

Under FPC's Safe Harbor rate Order of November 4, 1946, its two owners must pay for any output of additional plant, hypothetical though that output might be. This administrative amendment of the tariff destroys any basis for the Court's findings of "restrictions" on such output. What Safe Harbor has sold to its owners, it cannot sell to others.

The Fourth Circuit held that a wholly new business which has been created by its two owners, and the entire output of which is sold to its two owners, must, under the Sherman Act, compete with those owners despite the complete absence of any preexisting competition (not to mention its physical, charter, franchise, and certificate inability to compete). The cases cited by the Fourth Circuit involved preexisting competition,[38] and were thus inapplicable.

[38] *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904); *U. S. v. Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912); *U. S. v. Reading Co.*, 253 U. S. 26 (1920); *U. S. v. Crescent Amusement Co.*, 323 U. S. 173 (1944); and *Timken Roller Bearing Co. v. U. S.*, 341 U. S. 593 (1951). See also *U. S. v. Yellow Cab Co.*, *supra*, and *U. S. v. Columbia Steel Co.*, *supra*.

Kiefer-Stewart v. Seagram & Sons, Inc., 340 U. S. 211 (1951), did not compel competition between parent and wholly-owned subsidiary but forbade them from eliminating competition from independent wholesalers.

In *U. S. v. Griffith*, 334 U. S. 100 (1948), and *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948), and *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), a group of affiliated companies used conspiracy and group monopoly powers to defeat *competition offered the group from outside theatres.* No competition *between* parent and subsidiary corporations was required by these decisions.

With all these reasons for overruling the Fourth Circuit in the Safe Harbor case (now pending before this Court on applications for certiorari in Nos. 611 and 612), the invalidity of the Safe Harbor Contract cannot be assumed in this proceeding as has been done by Petitioners.

For many of the same reasons, the summary, *per se*-invalidation of the Baltimore Contract by the Fourth Circuit was erroneous, entirely aside from that Court's lack of jurisdiction. Our petition for certiorari having been denied in that case (No. 428, October term 1950), we shall not here repeat the arguments of that petition. However, the case at bar involves a different subject matter (FPC orders) and a different party (FPC), and the ruling of the *Fourth Circuit* should not be accepted as binding as to the invalidity of the Penn Water Contract for purposes of this proceeding. We repeat our belief that the Fourth Circuit's action was incorrect in the *Penn Water* case, and that the law of its decisions should herein be overruled.

B. UNDER PENNSYLVANIA LAW.

The Fourth Circuit erred in summarily invalidating the service contracts because of alleged violations of Pennsylvania Law.

1. The Pennsylvania statutes relied upon by the Fourth Circuit (184 F. 2d 552, 566 f.ns. 8, 9) provide that a Pennsylvania public utility must have the permission of that Commission in order lawfully to

> "sell, assign, transfer, lease, consolidate or merge its property, powers, franchises, or privileges, or any of them" and
>
> "to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise or privilege" or
>
> "to acquire from, or to transfer to any person * *'* by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to or the possession or use of, any tangible or intangible property, used or useful in the public service."

In this regard, the jurisdiction claimed by the Pennsylvania Commission over theoretical plant expansions and alleged transfers of franchises must give way to the paramount Federal jurisdiction over these matters under Sec. 10(b) (16 U. S. C., sec. 803(b)) which requires FPC approval of plant expansions (in excess of a miniscule 100 horsepower), and Sec. 8 (16 U. S. C., sec. 801) which requires Commission approval of the transfer of a license or rights thereunder[39] without which a hydro company's corporate franchise is valueless.

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[39] *H. P. Hood & Sons, Inc. v. Du-Mond*, 336 U. S. 525 (1949); *Mayor of Vidalia v. McNeely*, 274 U. S. 676 (1927); *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927); *Colorado v. United States*, 271 U. S. 153 (1926); *Buck v. Kuykendall*, 267 U. S. 307 (1925); *Bush Co. v. Maloy*, 267 U. S. 317, (1925); *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924); *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333 (1914); *Adams Express Co. v. New York*, 232 U. S. 14 (1914).

Even if the Safe Harbor or the Penn Water Agreement were a transfer of franchise, a lease of entire properties of a utility, an abandonment of service, or a renunciation of initiative in the exercise of duties prescribed by law,[40] the Federal law (in the broad powers conferred on the Federal Power Commission by the Federal Power Act, particularly Sections 8, 10(b), 203, 204-207, 16 U. S. C., secs. 801, 803(b), 824b, 824c-824f) has preempted the field in all such matters relating to licensees and public utilities subject to its control. (N. 39, *supra*, p. 74, and see 99 F. Supp. 151, *infra*, p. 76).

It is submitted that neither contract constitutes an abandonment of service or renunciation of initiative in the exercise of legal duties or surrender of franchise, as charged by Petitioners. The Record in the instant proceeding makes it abundantly clear that the Federal agency empowered by law to establish policy in this field has had these contracts before it since 1936, and has found no such surrender of duties by either Penn Water or Safe Harbor, as it would have been obliged to do in the performance of its official duties had any such surrender existed.

2. The Pennsylvania Commission has approved the contracts.

Both contracts have been on file since 1933 with the Pennsylvania Commission and have been before it from time to time. When it amended Safe Harbor's Certificate of Convenience and Necessity, Jan. 10, 1933 (R., Vol. 10, p. 3790) and issued to Penn Water a companion authorization to serve the Pennsylvania Railroad in Manor Township (R., Vol. 14, pp. 4483, 4485), the contracts for service were necessarily considered.

In 1946, in attempting to assert its jurisdiction in contravention of the jurisdiction already asserted by FPC, the Pennsylvania Commission began a contemporaneous rate

[40] As contended by PW Br., pp. 68-72, and PUC Br., pp. 20-28.

case against Penn Water; it later made Safe Harbor a party thereto; and it issued a temporary rate order, purporting to reduce rates and charges to the Pennsylvania customers of Penn Water. The contracts were before the Commission and necessarily played a part in its deliberations preliminary to its decision. But there was no indication from the Commission that it considered them to be unlawful. Because this rate reduction to Pennsylvania customers was at the direct and sole expense of Consolidated, under the residual Baltimore Contract, it was necessary for Consolidated and the Maryland Commission to seek relief in the Federal Courts in Pennsylvania.

The three-judge District Court for the Middle District of Pennsylvania, in permanently enjoining the Pennsylvania Commission's action, adjudged that all of Safe Harbor's output is sold in interstate commerce; that FPC had complete jurisdiction over Safe Harbor's rates, charges and properties; and that Federal power is supreme. *Consolidated Gas Electric Light and Power Company of Baltimore v. Siggins*, 99 F. Supp. 151 (1951). This coincides with the Third Circuit's previous decision to the same effect in the Safe Harbor rate case appeal, 179 F. 2d 179, cert. den. 334 U. S. 957 (1950).

With this long history of action by the Pennsylvania Commission with respect to these contracts which had been filed with it as tariffs, it was clearly improper for the Fourth Circuit summarily to strike them down as lacking Pennsylvania Commission approval, and therefore as violating the several sections of the Pennsylvania Public Utility Law on which the Fourth Circuit relied. It is significant that the Pennsylvania Commission has never offered to show that it ever disapproved these contracts.

3. The contracts were not *ultra vires*. It is not *ultra vires* for a corporation to sell its entire output. Especially is this

true with respect to the Safe Harbor Contract, under which the corporation sold its output to its two owners. It was not *ultra vires* to enter into a contract which was essential to the full utilization of hydro power and which assured a substantial return regardless of economic depressions. For 20 years both hydro companies prospered as they could not have done in the absence of the contracts. It was not *ultra vires* for Safe Harbor to agree to expand its plant when its stockholders requested it to do so. The advisory services of an Operating Committee in no wise divested the corporate officers of their managerial powers, and during 20 years of operation those provisions never had such effect. Contracts for the sale of the entire output of a plant do not violate the public policy of Pennsylvania.[41]

The Safe Harbor Contract is specifically authorized by the Pennsylvania Act of July 2, 1895.[42] In so far as the Baltimore Contract is concerned, the alleged "restrictions" which the Fourth Circuit found invalid under the Laws of Pennsylvania were Articles IV and V, which both FPC and the Fourth Circuit declared were not prescribed in the Penn Water tariff.

4. Both Penn Water and the Pennsylvania Commission, under well established principles of Pennsylvania law, were estopped from asserting the invalidity of these Contracts under the Public Utility Law of Pennsylvania and public policy.

As for the Pennsylvania Commission, it is not contended that the contracts here in question are absolutely void under the Pennsylvania Public Utility Law but merely that they lacked the Commission's approval. This is clearly a

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[41] *Walker v. Mason*, 272 Pa. 315, 116 A. 305 (1922); *Swift & Co. v. Hatleigh & Co.*, 66 Pa. Superior 504 (1917); *Greensboro Gas Co. v. Oil and Gas Co.*, 222 Pa. 4, 70 A. 940 (1908); *Salant v. Fox*, 271 Fed. 449 (CCA 3, 1921); and *Shipman v. Saltsburg Coal Co.*, 62 Fed. 146 (CCA 3, 1894).

[42] See Appendix, *infra*, pp. 81-82.

matter upon which the Pennsylvania Commission can and should be estopped in the light of its long history of dealing with the contracts. (See extracts from affidavit in the record of Nos. 611-612, this Term, pp. 164-171).

Commonwealth ex rel. Margiotti v. Union Traction Co., 327 Pa. 497 (1937);
Commonwealth ex rel. Attorney General v. Bala & Bryn Mawr Turnpike Co., 153 Pa. 47 (1893);
Central District and Printing Telegraph Co. v. Homer City Borough, 242 Pa. 597 (1914);
Pennsylvania Railroad v. Montgomery Co. Passenger Ry., 167 Pa. 62 (1895);
Valley Railways v. Harrisburg, 280 Pa. 385 (1924);
Breinig v. Allegheny City, 232 Pa. 474 (1938);
Ervin v. Pittsburgh, 339 Pa. 241 (1940).

The Pennsylvania Commission was thus estopped under the law of Pennsylvania from asserting its non-approval of these contracts, and the Fourth Circuit was in error in refusing to apply this Pennsylvania law. It had been properly pleaded and argued. (See consideration thereof in the District Court for Maryland in the Baltimore contract case, 89 F. Supp. 452, 459 (1950)).

The Pennsylvania Commission (Br. p. 20) asserts that the doctrines of *ultra vires* and public policy involved are "laid down in decisions of this court" citing *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396 (1889); *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24 (1891).[43]

These are cases involving factual situations utterly different from the instant case and are clearly inapplicable under modern regulatory statutes such as the Pennsylvania

[43] Cf. PW Br., pp. 69 *et seq.*

Public Utility Law and the Federal Power Act (the controlling law here) which confer upon Commissions the authority to approve and foster what those cases condemned.

Penn Water was likewise clearly estopped from attacking these contracts on the ground of *ultra vires* and violation of public policy. In *Pittsburgh, Johnstown, Ebensburg, and Eastern Railroad Company v. Altoona and Beech Creek Railroad Company*, 196 Pa. 452 (1900), the Court, denying an attack on a 990-year lease by a railroad of its properties as being *ultra vires* and against public policy, said:

> "In the present case, the cry of ultra vires is made by a party to the contract — to the executed agreement from which it has already derived some benefit. If it is ultra vires now, it was ultra vires then, when the contract was solemnly entered into by this appellee, with the full knowledge that there was no connecting line, and equity will turn a deaf ear for relief from a compact intelligently and deliberately made when prayed for by a party to it, whose conscience has become quickened only when hopes are disappointed and expectations not realized. If we are asked to give equitable relief to extended hands, they must not only be clean, but unfettered by a contract of their own making. * * *"

(See also: *Wright v. The Pipe Line Co.*, 101 Pa. 204 (1882); *South Side Passenger Railway Co. v. Second Avenue Passenger Railway Co.*, 191 Pa. 492 (1899); *McBride v. W. Pa. Paper Co.*, 263 Pa. 345 (1919)).

5. The applicable public policy is that established by the Federal Power Act. The agreement left the hydro companies entirely free to take the initiative in proposing rates, and the protracted litigation of their respective rate cases before FPC and the Pennsylvania Commission in positions adversary to Consolidated since 1944 (during which time

Penn Water was supporting and praising those contracts), demonstrates the hollowness of this contention. There is no evidence that either company ever failed to take the initiative in proposing rates or in rendering adequate service. The Fourth Circuit erred in the invalidation of the contracts because of their alleged violation of the public policy of Pennsylvania.

CONCLUSION

It is respectfully submitted that if Penn Water desires to change its services and rates, it should proceed in the orderly manner prescribed by the Federal Power Act, as it was directed to do by FPC over three years ago in its Order No. 173-A; that the collateral actions in the Fourth Circuit cannot annul the filed and prescribed FPC tariffs; that FPC has primary jurisdiction in the premises and the Federal authority is paramount; that the orders of FPC here assailed are within the authority of that Commission and are lawful in their entirety; and that the judgment of the Court below should be affirmed.

Respectfully submitted,

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March 27, 1952.

APPENDIX

TEXT OF PERTINENT PENNSYLVANIA STATUTE

Act of July 2, 1895, P. L. 432, Sec. 1,
15 P. S. Section 1404

Being a further supplement to an Act, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, to further provide for the incorporation and regulation of corporations heretofore or hereafter incorporated for the purpose of the supply, storage or transportation of water and water power for commercial and manufacturing purposes.

Section 1. Be it enacted, &c., That corporations heretofore or hereafter incorporated under the Act of Assembly, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and the supplements thereto, for the supply, storage or transportation of water and water power for commercial and manufacturing purposes, be and the same are hereby authorized and empowered to determine the character, design and construction of the works and the use to be made of the water and water power of such companies, in order that the same may be supplied to the public to the best advantage, and by themselves, their agents, engineers and workmen, cause to be located, constructed, maintained, repaired and operated under the law and supplements to which this is a further supplement, the said works and all machinery, dams, buildings, cisterns, races, canals, waterways, reservoirs, pipes, conduits, lines, plants, apparatus, fixtures and appliances deemed necessary, requisite and proper for said purposes, and it shall and may be lawful for such corporations from time to time to contract with any individual or corporation of this or any other State for

the construction, operation, use and maintenance of their works or any part thereof as aforesaid, and to mortgage their said property, real, personal and mixed, and franchises to any person or corporation of this State or elsewhere, either directly or as trustee, to secure the payment of such indebtedness as may be incurred or created for the purpose of constructing and erecting the said works, or as a guaranty for the faithful performance of contracts and covenants on the part of such water and water power company to be performed, including the guaranty of the payment of the bonds and interest thereon of any other corporation, party to such contract, and the stock in any company incorporated for the purposes named in this Act may be owned and held by corporations of this or other States of the United States.

Approved — The 2d day of July, A. D. 1895.

DANIEL H. HASTINGS.